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Choice of Law in Lawyers' Engagement Agreements

Francesca Giannoni-Crystal*
& Nathan M. Crystal**

ABSTRACT

The engagement agreement is the most important document in the attorney-client relationship. Properly drafted engagements clarify roles, responsibilities, and expectations, minimize disputes, and protect lawyers from liability to the maximum extent possible. Provisions on fees and expenses are, of course, fundamental, but lawyers should consider a wide range of other topics, such as scope of engagement, authority of counsel, client responsibilities and cooperation, attorney liens, file preservation and storage, use of technology in handling cases, and withdrawal and termination. This article considers an important but usually-ignored topic—choice of law (“COL”) and choice of forum (“COF”) clauses.

Part I of the paper examines choice of law in the absence of a COL clause. After an introduction that discusses basic choice-of-law principles and the importance of the distinction between procedure and

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substance, the section considers choice-of-law in three important selected issues: legal malpractice, fee caps, and lawyer liens.

Part II turns from choice-of-law principles in the absence of agreement to the issue of enforceability of COL and COF clauses. Part II(A) analyzes the case law dealing with enforceability of COL and COF clauses. The discussion shows a wide divergence among the courts in approach and results regarding enforcement of these clauses.

The extensive judicial inquiry required by this state of the law discourages lawyers from including selection clauses in their agreements. This situation creates uncertainty because parties cannot anticipate which law courts will apply to any of the varied disputes that might arise. In short, the present situation is unfair and inefficient to both client and lawyer.

In Part III(B) we contend that COL clauses should be enforceable if they meet two requirements: (1) the law chosen has a reasonable relationship to the engagement agreement, the parties, or the dispute; and (2) application of the chosen law does not violate a clear, strong public policy of the forum. We also argue that such clauses should *not* be subject to a requirement of informed consent. By contrast, COF clauses should be subject to informed consent because of the potential burden that could be placed on a client who would be required to litigate against an attorney in a jurisdiction other than the client's home jurisdiction. The article concludes with drafting suggestions for lawyers to consider when including COL or COF clauses in their engagements. In particular, we offer suggested language when lawyers seek informed client consent to a COF. If courts follow our proposals we believe that the enforceability of COL and COF clauses will be much clearer, that lawyers will have an incentive to include such clauses in their engagements, and that fair treatment of clients will not suffer.

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I. INTRODUCTION

The engagement agreement is the most important document in the attorney-client relationship. Properly drafted engagements clarify roles, responsibilities, and expectations, minimize disputes, and protect lawyers from liability to the maximum extent possible. Provisions on fees and expenses are, of course, fundamental, but lawyers should consider a wide range of other topics, such as scope of engagement, authority of counsel, client responsibilities and cooperation, attorney liens, file preservation and storage, use of technology in handling cases, and withdrawal and termination. This article considers an important but usually ignored topic in engagement agreements: choice of law ("COL") and choice of forum ("COF") clauses.

Part II examines choice of law in the absence of a COL clause. After an introduction that discusses basic choice-of-law principles and the importance of the distinction between procedure and substance, the section considers choice of law in three important selected issues: legal malpractice, fee caps, and lawyer liens.

Part III turns from choice-of-law principles in the absence of agreement to the issue of enforceability of COL and COF clauses. Part III(A) examines the case law dealing with enforceability of COL and COF clauses. The discussion shows a wide divergence among the courts in approach and results regarding enforcement of these clauses. Part III(B) presents an argument for enforceability of COL and COF clauses founded on principles of efficiency and fairness. We argue for different treatment of the two types of clauses. We contend that COL clauses should be enforceable if they meet two requirements: (1) the law chosen has a reasonable relationship to the engagement agreement, the parties,

or the dispute; and (2) application of the chosen law does not violate a clear, strong public policy of the forum. We also argue that such clauses should *not* be subject to a requirement of informed consent. By contrast, COF clauses should be subject to informed consent because of the potential burden that could be placed on a client who would be required to litigate against an attorney in a jurisdiction other than the client's home jurisdiction. The article concludes with drafting suggestions for lawyers to consider when including COL or COF clauses in their engagements. In particular, we offer suggested language when lawyers seek informed client consent to a COF.

II. CHOICE OF LAW IN THE ABSENCE OF A COL CLAUSE

A. *General Discussion*

Choice of law in disputes between attorney and client can arise in a variety of settings: malpractice, fee caps, lawyer liens, and standards for *quantum meruit* recovery, to name a few. It is impossible, however, to identify a general rule for choice of law that applies to *all* disputes between attorney and client. The interests and legal principles vary greatly depending on the context, meaning that each issue requires a separate analysis. This is true not only in those jurisdictions that apply a modern interest analysis approach (e.g., New York)¹ but also in those that apply more traditional criteria of conflict of laws (e.g., South Carolina).²

Under an interest analysis approach, because "the goal . . . is to determine, from the facts of each case, which jurisdiction has the most significant relationship to the given situation,"³ every aspect of the situation requires a different balancing analysis. For example, a jurisdiction might be interested in regulating the conduct of lawyers that are admitted in that jurisdiction; another jurisdiction may be interested in determining the standard of care and remedies in a malpractice action brought by one of its citizens. Several jurisdictions may have an interest in temporary admission to practice.

For those jurisdictions that apply more traditional approaches (e.g., *lex fori*, which is used, for example, for the admissibility of evidence; *lex commissi delicti*, which is used for tort matters; and place of

1. See *Babcock v. Jackson*, 191 N.E.2d 279, 285 (N.Y. 1963) (adopting the most significant contacts analysis for solving conflict of laws issues).

2. See *Rogers v. Lee*, 777 S.E.2d 402, 405 (S.C. Ct. App. 2015).

3. Robert C. Lawrence, III & Elisa Shevlin Rizzo, *Basic Conflict of Laws Principles*, in *INTERNATIONAL TAX AND ESTATE PLANNING* 3, 10 (3d ed. 1999) (citing *Babcock*, 191 N.E.2d at 287; Willis L.M. Reese, *Choice of Law Rules or Approach*, 57 CORNELL L. REV. 315 (1972)).

performance, which is used for contracts), it is also quite evident that the several aspects of the relationship between lawyer and client might not be governed by the same law: the conflict rule for the standard of care is the conflict rule for torts while the conflict rule for fee issues, for example, is the conflict rule for contracts.

An attorney-client relationship has some economic aspects (e.g., fees, liens, and trust accounts) and some liability aspects (e.g., conflict of interest, malpractice, and breach of fiduciary duty). We will limit our choice of law analysis to three aspects: malpractice (briefly including a discussion of conflict of interest⁴), fee caps, and liens.

Before delving into an analysis of which law should apply to these aspects, a preliminary issue is whether the identification of the applicable law is a matter of procedure or substance. If the matter is procedural, the rules of the forum should apply. Scholars have criticized the dichotomy between substance and procedure as artificial,⁵ but the distinction cannot be ignored because courts use it, and because it has a constitutional basis. Indeed, if the jurisdiction of a federal court is based on diversity, the

4. For more on conflicts of interest, see generally Barrett Schitka, *Private International Law Implications in Conflicts of Interest for Lawyers Licensed in Multiple Countries*, 60 MCGILL L.J. 431 (comparing Canadian rules and American rules and finding substantial uniformity in current clients rules and discrepancies in former clients, because some American courts are stricter than Canadian courts in extending the conflict of interest to the firm).

5. See, e.g., Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801 (2010). Professor Main qualifies the relationship between procedural rules and substantive rules as a "false dichotomy." *Id.* at 803. The author explains that

[P]rocedure is inherently substantive, . . . and the converse is also true. Specifically, the construction of substantive law necessarily entails making assumptions about how that law ultimately will be enforced. Many of those assumptions are rooted in the procedures pursuant to which a claim to vindicate that law would be litigated

Once we see that procedure is embedded in substantive law, we can appreciate the additional strain that this places on the substance-procedure dichotomy and on doctrines that are premised upon the legitimacy of that dichotomy. Consider, in particular, the practice of applying forum procedural law no matter the applicable substantive law. When forum procedure is combined with foreign substantive law, the procedure that was embedded in the foreign substantive law is displaced. Applying forum procedural law to another system's substantive law necessarily distorts the latter.

Id. at 802. The author discusses the origin of the dichotomy between substance and procedure (Part I), and explains incoherencies of the doctrines constructed upon the dichotomy (Part II). *Id.* at 812–18. In Part III, the author points to how procedure is inherently substantive and in Part IV how procedure is embedded in substantive law. *Id.* at 818–30. In Part V, the author considers alternative conceptual approaches and ends with advocating his own middle-ground approach to solve the issue. *Id.* at 830–40.

analysis is constitutionally-based. In state courts, while the analysis is not constitutionally-based, the distinction between substantive and procedural is fundamental because only if the matter is substantive will we have a conflict of law analysis (if procedural, the forum court simply applies its own law).⁶ Another way of seeing this is that, for a procedural issue, the court applies a simple conflict rule that always points to the forum state.

In the landmark decision *Erie Railroad Co. v. Tompkins*,⁷ the Supreme Court held that in diversity

the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.⁸

Without this rule, the result of a case could be different depending on whether the plaintiff brings the case in federal court or state court.

The *Erie* doctrine is specified further in other important cases: *Cities Service Oil Co. v. Dunlap*,⁹ *Guaranty Trust Co. v. York*,¹⁰ and *Hanna v. Plumer*.¹¹ In *Dunlap*,¹² the Court applies the *Erie* doctrine to burden of proof. The Court distilled a rule that is narrower than a rule that would simply provide that the burden of proof is substantive. The Court held that the burden of proof on a particular element of a substantive right (in that case, whether a person is a bona fide purchaser without notice) is a matter of substantive law.¹³ The Court held that whether a record title-holder must prove that it is a bona fide purchaser is a matter of substantive law.¹⁴ There, Texas law provided that the record title-holder was entitled to rely on record title, while a party attacking the record title had to come forward with evidence that the title-holder was not a bona fide purchaser.¹⁵

6. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1971).

7. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

8. *Id.* at 78.

9. *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939) (holding that the *Erie* doctrine applies to burden of proof).

10. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

11. *Hanna v. Plumer*, 380 U.S. 460 (1965).

12. *Dunlap*, 308 U.S. at 212.

13. *Id.*

14. *Id.*

15. *Id.* at 212-13.

In *York*,¹⁶ the Supreme Court clarified that the “state law” that a federal court is bound to apply when sitting in diversity includes “equity.” The case also established the “outcome determinative” test to identify what substantive law is. In *York*, the Court had to decide whether the statute of limitations of an equitable right was substantive or procedural.¹⁷

It is . . . immaterial whether statutes of limitation are characterized either as ‘substantive’ or ‘procedural’ in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.¹⁸

The court recognized that the state statute of limitations was outcome determinative (and hence substantive) and therefore was to be applied by the federal court.¹⁹

In *Hanna*, the Supreme Court limited the application of the “outcome determinative” test by referring to the *Erie* policies.²⁰ In *Hanna*, the Court held that even if the lack of compliance with Massachusetts in-hand service procedure was outcome determinative, it was not enough to invalidate Federal Rule of Civil Procedure 4(d)(1), which governs the service of process in diversity action.²¹ The Court stated that

[R]ules of practice and procedure may and often do affect the rights of litigants The fact that the application of Rule 4(f) will operate to subject petitioner’s rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights.²²

16. *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945).

17. *Id.* at 109.

18. *Id.*

19. *Id.* at 110.

20. *Hanna v. Plumer*, 380 U.S. 460, 477–78 (1965).

21. *Id.* at 464–65 (quoting *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 445–46 (1945)).

22. *Id.* at 465.

The Court clarified that “the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic ‘litmus paper’ criterion, but rather by reference to the policies underlying the *Erie* rule.”²³ *Erie*—held the court—was also, in part, a reaction to the practice of “forum-shopping.”

The ‘outcome determination’ test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws.²⁴

Here—the Court pointed out—finding Massachusetts Rule 4(d)(1) applies or does not apply changes the result because it results in the litigation being able to continue or not.²⁵ “But, in this sense, every procedural variation is ‘outcome determinative.’”²⁶

B. Selected Issues

1. Malpractice

Traditionally, the practice of law was limited to a single jurisdiction. Lawyers were admitted to practice in one state and represented clients who were residents or did business in that state. Increasingly, however, lawyers’ practice, even practice in very basic areas like divorce, real estate, workers’ compensation, or automobile accidents, involves multiple jurisdictions. In fact, most states have enacted a version of ABA Model Rule 5.5 allowing for some degree of multijurisdictional practice.²⁷ In the past lawyers may not have paid much attention to the law governing their obligations, but now in a multidisciplinary world such attention is important.

The choice-of-law issues involved in malpractice claims not only deal with which standard of care applies in evaluating the lawyer’s conduct and competence, but also involve many other issues, such as scope of the lawyer’s duty (e.g., intended estate beneficiaries and the privity doctrine), the possibility of bringing a breach of fiduciary duty claim on the same facts as malpractice, statutes of limitations, requirement of affidavit of merit to bring the malpractice action, scope of attorney-client privilege, enforceability of limited engagement agreement, culpability issues, and possibly others.

23. *Id.* at 467.

24. *Id.* at 468.

25. *Id.*

26. *Id.* (emphasis omitted).

27. See *State Implementation of ABA MJP Policies*, AM. BAR ASS’N (Apr. 20, 2016), <http://bit.ly/1huUcVj>.

There are issues that would seem strictly procedural (e.g., statute of limitations), but there can be surprises, for example whether an affidavit of merit is requested to bring a malpractice case and who can give it. It would seem straightforward to say that this is a procedural issue, but, actually, some federal courts in diversity cases have held that state law on affidavit of merit applies.

For example, in *Chamberlain v. Giampapa*,²⁸ the court held that the state affidavit of merit statute (New Jersey's statute) applied in federal court when the court sits in diversity.²⁹ In that case, a patient sued her plastic surgeon alleging negligence with respect to her medical care and treatment. The plaintiff did not file an affidavit of merit within 60 days of the defendant's answer and did not request an extension as New Jersey affidavit of merit statute requires. The defendant moved to dismiss based on the plaintiff's failure to file an affidavit of merit.³⁰ The court denied the plaintiff's argument that the New Jersey affidavit of merit statute would directly conflict with Federal Rules of Civil Procedure 8 and 9 governing the content of pleadings in federal actions.³¹ The court found no direct conflict between the New Jersey affidavit of merit statute and Federal Rules of Civil Procedure 8 and 9, because "Rules 8 and 9 dictate the content of the pleadings and the degree of specificity that is required" and "[t]he affidavit of merit statute has no effect on what is included in the pleadings of a case or the specificity thereof."³² Because the court found no direct adversity, it performed an *Erie*³³ analysis and concluded that

28. *Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 2000).

29. *Id.* at 157.

30. *Id.* at 158.

31. *Id.* at 160.

32. See also *Finnegan v. Univ. of Rochester Med. Ctr.*, 180 F.R.D. 247 (W.D.N.Y. 1998) (holding that a requirement of certificate of merit is a substantive law that applies in a federal diversity action); *Connolly v. Foudree*, 141 F.R.D. 124 (S.D. Iowa 1992) (finding no direct conflict between a state statute requiring early disclosure of expert witnesses in professional liability cases, and Federal Rule of Civil Procedure 26(b)(4)(A)(i), and concluding the state statute did not conflict with federal rule); *Hill v. Morrison*, 870 F. Supp. 978 (W.D. Mo. 1994) (finding that a Missouri statute requiring the plaintiff to file an affidavit of merit within ninety days of filing a complaint goes beyond the requirements of Federal Rule of Civil Procedure 11, but does not conflict with the Federal Rule, and therefore both state and federal rules may be given effect in federal court in diversity action); *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523 (10th Cir. 1996) (finding no direct conflict between a Colorado statute requiring a plaintiff or attorney to file a certificate within sixty days of filing complaint, and Federal Rule of Civil Procedure 11). *Contra* *Boone v. Knight*, 131 F.R.D. 609 (S.D. Ga. 1990) (finding a conflict between Federal Rule of Civil Procedure 8, and a Georgia statute requiring the filing of an affidavit with the complaint setting forth the facts upon which the claim is based).

33. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[T]he New Jersey affidavit of merit statute is substantive state law that must be applied by federal courts sitting in diversity. The state statute is outcome determinative on its face, and failure to apply it would encourage forum shopping and lead to the inequitable administration of the law. Further, we perceive no overriding federal interest here that would prevent application of the state law by the federal courts.³⁴

Relevant differences exist among jurisdictions in conflict of law rules for malpractice issues. Some jurisdictions apply the *lex loci delicti*, while others engage in a governmental interest analysis, sometimes attaching paramount importance to the licensure of the lawyer.

A recent South Carolina case illustrates application of *lex loci delicti*. In *Rogers v. Lee*,³⁵ the court of appeals dealt with the law applicable to a legal malpractice action. In *Rogers*, the client, Malloy, hired attorney Lee to represent him in a worker's compensation claim in North Carolina resulting from a fall from a ladder in North Carolina. Malloy was a resident of South Carolina and Lee was a South Carolina based attorney, licensed in both North and South Carolina. The case was settled in North Carolina by agreement with the employer and the carrier. Later, Malloy, through his *guardian ad litem*, Rogers, brought a legal malpractice case against Lee.³⁶

The court of appeals held that, in a tort action, South Carolina follows the choice-of-law principle of *lex loci delicti*.³⁷ Under this principle, the law of the place where the injury (meaning the damage to the client resulting from the malpractice) occurs controls.³⁸ In that case, the injury occurred in North Carolina where the lawyer's allegedly negligent advice led to the client's acceptance of a settlement before the Industrial Commission in North Carolina. The client lost the right to pursue his worker's compensation claim or to settle for a greater amount. In applying the principle of *lex loci delicti*, the court distinguished between the place of the injury and the place where the results of the injury manifest themselves. The results manifested themselves financially in South Carolina where Malloy resided, but the injury took place in North Carolina.³⁹ The court specifically rejected the residence of the client as the basis of choice of law.⁴⁰

34. *Chamberlain*, 210 F.3d at 161.

35. *Rogers v. Lee*, 777 S.E.2d 402 (S.C. Ct. App. 2015).

36. *Id.* at 403–05.

37. *Id.* at 405, 408.

38. *Id.* at 405.

39. *Id.* at 405–06.

40. *Id.* at 406–07. In fact, saying that the law of the place of tort controls begs the question of where this place is. A court could choose the place where the negligence occurred, or could choose the place where the patrimonial damage to the victim occurs

In addition, the contract of representation provided that North Carolina law governed the representation. The court held that the COL clause in the contract of representation was enforceable.⁴¹ North Carolina had a four-year statute of repose. Applying that statute, the court of appeals affirmed the circuit court's decision granting summary judgment for the defendant lawyer. The court also found that application of the North Carolina statute did not violate a fundamental public policy of South Carolina.⁴²

Chief Justice Few, concurring, agreed that North Carolina law governed the claim of malpractice arising from handling of the workers' compensation claim, but other aspects of the relationship might be governed by the substantive law of South Carolina, for example claims against the ladder manufacturer, the floor installer, or medical providers, some of which were located in South Carolina.⁴³

New York, unlike South Carolina, employs an interest choice-of-law analysis, which gives controlling effect to the law of the jurisdiction which, because of its relation or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.⁴⁴ When conducting an interest analysis for any tort claim, the most significant contacts are, almost exclusively, the parties' domiciles and the locus of the alleged tort. "With respect to the specific tort of legal malpractice, 'a state has a strong interest in regulating the conduct of a law firm [or lawyer] licensed to practice within its borders, and a law firm [or lawyer] consents to be so regulated when it locates its offices in a particular state.'"⁴⁵

(meaning the victim's residence). The South Carolina court of appeals in *Rogers* expressly refused to use the residence of the victim (there, the attorney's client) as the place relevant under the *lex loci delicti*. *Id.* A different position, which would give relevance to the residence of the client, is also reasonable, however. *See, e.g., Parker v. Asbestos Processing, LLC*, No. 0:11-cv-01800-JFA, 2015 U.S. Dist. Lexis 1765, at *35–37 (D.S.C. Jan. 8, 2015). Also, it should be noted that choosing the place where the negligence occurs might be easy in cases in which the lawyer assisted in a litigation or—as in *Rogers*—in a proceeding in front of an agency. It might not be so easy when the lawyer assists in a transaction or renders an opinion. For example, imagine that Lee—without leaving his South Carolina office—had rendered an opinion concerning North Carolina workers' compensation on which his client had relied to his detriment. Where would the injury occur in such a situation?

41. *Rogers*, 777 S.E.2d at 406.

42. *Id.* at 407–08.

43. *Id.* at 408–09.

44. *Babcock v. Jackson*, 191 N.E.2d 279, 284–85 (N.Y. 1963) (adopting the most significant contacts analysis for solving conflict of laws issues); *see also* Gary J. Simson, *Choice of Law after the Currie Revolution: What Role for the Needs of the Interstate and International Systems?*, 63 MERCER L. REV. 715, 721 (2011).

45. *Cobalt Multifamily Investors I, LLC v. Shapiro*, 857 F. Supp. 2d 419, 431 (S.D.N.Y. 2012); *accord Diversified Grp. v. Daugerdas*, 139 F. Supp. 2d 445, 453

A good example of the application of the place of licensure in the governmental analysis is *LNC Invs., Inc. v. First Fid. Bank, N.A.*⁴⁶ In that case, investors in an indenture trust lost their investment and sued the trustee. The indenture trust was secured by airplanes that were leased to an airline; the airline went bankrupt and the trustees delayed filing a motion to lift the bankruptcy stay. The value of collateral plummeted, and the investors—who became undersecured—filed a suit against the trustees and their attorneys.⁴⁷

The collateral trustee, First Fidelity, sought to implead a successor trustee and its attorneys (law firm Gibson, Dunn) for contribution. First Fidelity alleged that “Gibson, Dunn is liable to it for contribution on the theory that Gibson, Dunn is liable to plaintiffs and to First Fidelity for attorney malpractice.”⁴⁸

In the case the choice of the applicable law was determinative, with Gibson, Dunn contending that New York law applies and First Fidelity pressing for the application of New Jersey law.⁴⁹

New York law permits claims for attorney malpractice when the relationship between the parties is one of actual privity, or one that is so close as to approach that of privity. The exception to the requirement of actual privity has been interpreted narrowly by the New York courts.⁵⁰

Instead, New Jersey recognized that “attorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorneys’ representations and the non-clients are not too remote from the attorneys to be entitled to protection.”⁵¹

The court found that, under “interest analysis,”

[C]ontrolling effect [is given] to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issues raised in the litigation. In a tort case, the most important contacts are the parties’ domiciles and the site of the alleged tort [but] [a] . . . state has a strong interest in regulating the conduct of a law firm licensed to

(S.D.N.Y. 2001) (holding that “[a] state has a paramount interest in regulating the conduct of attorneys licensed to practice within its borders”).

46. *LNC Invs., Inc. v. First Fid. Bank, N.A.*, 935 F. Supp. 1333 (S.D.N.Y. 1996).

47. *Id.* at 1336–37.

48. *Id.* at 1350.

49. *Id.*

50. *Id.* (internal citations omitted).

51. *Id.* (internal citations omitted).

practice within its borders, and a law firm consents to be so regulated when it locates its offices in a particular state.⁵²

The court held that licensure was paramount here:

That principle exerts extra force here because New York, by adopting an attorney-protective strict privity rule, has articulated a strong interest in protecting its resident attorneys from suits by non-clients. Likewise, New York attorneys are entitled to rely on that protection when they practice law in New York. New Jersey has some interest in regulating out-of-state attorneys who enter that state, and in protecting its domiciliaries who participate in out-of-state transactions. But those interests do not outweigh New York's interests here.⁵³

These two are only examples of possible variations of choice of law in malpractice actions. The difference in approaches is one strong reason why the parties may want to include a choice of law choice of forum in their engagement agreement. We discuss in Part III the enforceability of COL (and COF) clauses in engagement agreements.

2. Fee Caps

Fee caps—either established by act of legislature or by court—are limits to the legal fees that can be received by a lawyer in a contingent fee arrangement. Fee caps are different from the ethics rule under which lawyers cannot charge an unreasonable fee.⁵⁴ However, a lawyer that charges a fee above a state fee cap would be charging an unreasonable fee.⁵⁵

At least six jurisdictions (Connecticut,⁵⁶ Florida,⁵⁷ Michigan,⁵⁸ New Jersey,⁵⁹ New York,⁶⁰ Oklahoma⁶¹) have established fee caps. In the fee

52. *Id.* at 1350–51 (internal citations omitted).

53. *Id.* at 1351.

54. MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (AM. BAR ASS'N 2016) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.").

55. In determining the jurisdiction whose ethics rules control, account should be taken of the provision of Rule 8.5(b)(1)(2). MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(1)(2). While formally this rule identifies the disciplinary authority for ethics violation, it is used also to identify the set of rules of conduct with which a lawyer must comply.

56. CONN. GEN. STAT. § 52-251c (2016).

57. R. REGULATING FLA. BAR r. 4-1.5(f)(4).

58. MICH. CT. R. 8.121.

59. N.J. CT. R. 1:21-7.

60. New York has four separate caps, because each Appellate Divisions of the Supreme Court adopted a fee cap. They have very similar language and range. N.Y. COMP. CODES R. & REGS. tit. 22, § 603.25(e) (2017); *id.* § 691.20(e); *id.* § 806.13(b); *id.* §

cap states, legal fees in personal injury cases are generally capped, and so are legal fees in wrongful death and damage to property actions—sometimes fees in medical malpractice actions⁶² or contractual claims⁶³ are also capped. The statute or court rule may cap legal fees significantly,⁶⁴ therefore the applicability or nonapplicability of a fee cap can make a substantial difference for the lawyer.⁶⁵ Which fee cap to apply, if any, is a critical question.

The issue is particularly critical in the case of multidistrict litigation (“MDL”) with the plaintiffs and their counsel coming from several jurisdictions. The following situation is illustrative of the issue. Let’s imagine that the client is a resident of a fee cap state (“FCS”)—for example, Connecticut, where fee caps range from 33-1/3 percent for the first \$300,000 to ten percent for the sums above \$1,200,000.⁶⁶ We imagine first that the case is filed in a non-fee-cap state (“NFCS”)—for example, North Carolina—and then transferred to an MDL (and here two scenarios are possible: the MDL is in a FCS—for example, Florida—or the MDL is in a NFCS—for example, Illinois). We could also imagine then that case is filed post-MDL in North Carolina or that the case is filed post-MDL in Connecticut. In addition, we can also imagine that the case is filed in North Carolina but then transferred to New York (notice that New York is also a FCS but its fee caps are different from Connecticut fee caps). We can also imagine that the case is filed directly with the MDL, which can open two possibilities: direct filing with the MDL in New York (which is a FCS but the caps are different from Connecticut), or direct filing with an MDL in North Carolina.

Should the contingent fee be capped? And if so, which cap? We are not suggesting an answer here, we only want to show how complicated the issue can be.

To understand which law should control the issue, an important question would seem to be whether fee caps are substantive or

1015.15(b); see also *id.* §§ 1400.1–1400.5 (1994) (covering legal fees in domestic relation matters); see also N.Y. JUD. LAW § 474 (Consol. 2017) (listing allowable contingent fees in medical, dental, or podiatric malpractice cases).

61. OKLA. STAT. tit. 5, § 7 (2011).

62. See, e.g., N.Y. JUD. LAW § 474.

63. See, e.g., OKLA. STAT. tit. 5, § 7.

64. While in some cases the cap is pretty high, the cap can also be very low. See, e.g., *id.* (capping legal contingency fees at 50 percent in Oklahoma); but see CONN. GEN. STAT. § 52-251c(b) (2016) (capping Connecticut legal fees where the amount of recovery is above \$1.2 million at ten percent).

65. See, e.g., Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833, 1857 (2011) (“Given the substantial sums at stake, especially in high value cases, one would expect contingent-fee attorneys strongly to prefer to file cases in jurisdictions without fee caps, other things being equal.”).

66. CONN. GEN. STAT. § 52-251c(b).

procedural. If they are procedural, the forum would apply its own rules on caps, and would not engage in a conflict of law analysis. If they are substantive, the courts should engage in the conflict analysis. If it is a federal court, the discussion would have a constitutional basis.⁶⁷ However, this procedural versus substantive inquiry is *not* the type of analysis that courts (especially MDL) have done in fee caps determination.

There are a number of significant MDL cases in which the courts assume that they have inherent authority to set fees. These courts treat state fee caps as a nonbinding factor to use in determining reasonable fees and do not engage in a procedural versus substantive analysis and even less in conflict of law analysis. For example, *In re Zyprexa Products Liability Litigation*⁶⁸ is a good example of a MDL case in which the court set the fees in its discretion. Judge Weinstein, in his opinion, referred to state fee caps in justifying the court's inherent authority to establish reasonable fees, but he did not find that he was bound to follow any state fee caps, including those in New York where the court sits.⁶⁹ Another example is *In re Vioxx Products Liability Litigation*,⁷⁰ where the court found that it had inherent authority and also authority under the MDL statute⁷¹ to promote the "just and efficient" conduct of such actions, to set attorney fees in the matter. The *Vioxx* court considered state fee caps in determining the reasonableness of fees but—as the *Zyprexa* court—did not consider itself bound to follow such fee caps.⁷²

A recent report from the Duke Center for Judicial Studies, setting forth proposed best practices for courts in MDLs,⁷³ does not mention state fee caps and assumes the power of MDL courts to set fees, including the power to establish common benefit funds. The Duke Report points out that "[c]ourts also have found the related authority to assess common benefit attorneys' fees in the terms of agreements entered into among plaintiffs' counsel and between plaintiffs' counsel and defendants."⁷⁴

67. See generally *supra* Part II.A.

68. *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488 (E.D.N.Y. 2006).

69. *Id.* at 495–97.

70. *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549 (E.D. La. 2009).

71. 28 U.S.C. § 1407 (2012).

72. *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d at 555.

73. Jaime Dodge et al., *MDL Standards and Best Practices*, DUKE L. CTR. FOR JUD. STUD. (Sept. 11, 2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf [hereinafter *Duke Report*].

74. *Id.* at 51–52. The Duke Report, however, recognizes that "any matters addressed by agreement of the parties that expressly confer authority on the court may result in future challenges. . . . Despite a court's contrary view, plaintiffs' attorneys have not always agreed that the settlement agreement terms vested the courts with the authority to

Therefore, in the cited case law and in the Duke Report, the distinction between substantive and procedural issues and the possible application of *Erie* is basically ignored. This is not always the case, however.

In *Mitzel v. Westinghouse Electric Corp.*,⁷⁵ the Third Circuit held that fee cap provisions were procedural rather than substantive.⁷⁶ The court reasoned that rules regulating contingent fee agreements are of particular concern to courts because they pertain to the conduct of members of the bar.⁷⁷ The court distinguished fee-shifting statutes, which it recognized were substantive rather than procedural.⁷⁸

In that case, a Pennsylvania resident hired Pennsylvania lawyers to litigate a personal injury claim that arose and was filed in New Jersey. New Jersey court rules imposed limits on contingency fees, and the New Jersey federal courts had adopted the state fee cap rule as a local federal court rule. Pennsylvania did not have a fee cap provision.⁷⁹ The district court applied its local fee cap rule, treating it as procedural, and the Third Circuit affirmed.⁸⁰

The case does not necessarily decide how a court in the Third Circuit would deal with a case in which the matter was filed in a nonfee cap state, but the plaintiff was a resident of a fee cap jurisdiction. In this situation, the forum would not have an applicable rule, so there would be no rule of procedure to follow.

On the other hand, *Volkswagen Group of America, Inc. v. Peter McNulty Law Firm*⁸¹ was a class action settlement that was part of a MDL. The court held that the award of attorneys' fees was not a matter of federal law under Federal Rule of Civil Procedure 23(h), but rather was a matter of state law under *Erie*.⁸² The court applied the conflict-of-law rules of the transferor court to determine that Massachusetts law governed the determination of fees in the case.⁸³

impose contingency fee caps." *Id.* at 52 (citing Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 73 (2013)).

75. *Mitzel v. Westinghouse Elec. Corp.*, 72 F.3d 414 (3d Cir. 1995).

76. *Id.* at 418.

77. *Id.* at 417.

78. *Id.*

79. *Id.* at 415.

80. *Id.* at 415–18.

81. *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4 (1st Cir. 2012).

82. *Id.* at 13; see also FED. R. CIV. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.").

83. *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d at 17–18; see also Monica Hughes, *Applying State Contingency Fee Caps in Multidistrict Litigation (MDL)*

While the weight of practice and practicality seem to support the authority of the MDL courts to regulate fees unbound by fee caps, it would be dangerous to give too much weight to these considerations. Indeed, the U.S. Supreme Court has previously rejected a long-standing MDL practice as a violation of the statute.⁸⁴ Here the argument for applying state fee caps is even stronger because it is both constitutional (*Erie*) and statutory (absence of authority to determine fees in the MDL statute). In Part III of this article, we discuss the possible application of a COL clause in an engagement agreement on the issue of fee caps.

3. Liens

a. General Considerations

A lawyer's "lien" is the right "to hold a client's property or money until payment has been made for legal aid and advice given."⁸⁵ There are two types of liens: a "retaining lien" and a "charging lien."

The retaining lien is the attorney's right to retain client papers or other valuable client property in the lawyer's possession as security for any unpaid amount the client owes the lawyer. The lien arises as a matter of law rather than pursuant to contract and is based on equitable principles: The attorney has rendered substantial services or advanced expenses on the client's behalf and should be entitled to compensation. The lien is purely possessory; the lawyer may not sell the client's property to satisfy the client's debt to the lawyer. Because of the coercive aspects of the lien, some jurisdictions no longer recognize it, and others have cautioned lawyers against exercising the lien when the client would be prejudiced.⁸⁶

The second form of lien is the charging lien, which is applied against the proceeds of any settlement or judgment for any unpaid fees or expenses due the attorney. Where recognized, the charging lien is generally based on statute, although a few jurisdictions allow the charging lien to be created by contract. When the lien is created by

Settlements, 91 TEX. L. REV. 961 (2013) (arguing that state fee caps are substantive under *Erie*).

84. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28, 35 (1998) (holding, in a unanimous decision, that the MDL court had no authority to reassign a transferred case to itself for trial, despite twenty years of MDL practice to the contrary).

85. *Attorney's Lien*, THE FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/Attorney's+Lien> (last visited March 26, 2017); *Lien*, BLACK'S LAW DICTIONARY (10th ed. 2014).

86. NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 108 (6th ed. 2017) (emphasis omitted) (internal citations omitted).

statute, lawyers must obviously comply with statutory requirements for perfection and enforcement of a charging lien.⁸⁷

We discuss here only the conflict of law issues with regard to charging liens.⁸⁸

The rules of professional conduct deal with the lien under the topic of conflicts of interest.

ABA Model Rule 1.8(i):

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses⁸⁹

Acquiring an interest in the property of the client in the form of lien would be a conflict of interest unless allowed by the exception. Among other reasons, a lien can be an obstacle to the client's firing the lawyer and hiring a new counsel, exactly as the contingent fee is a specific exception.⁹⁰

87. *Id.* at 109. Charging liens are considered important to allow compensation of lawyers, so encouraging them to perform legal services, which are often necessary to create funds from which clients' creditors can be paid. William B. Hairston, III, *The Ranking of Attorney's Liens Against Other Liens in the United States*, 7 J. LEGAL PROF. 193, 195 (1982). The important role of lawyers explains perhaps why "[i]n thirty-two states this lien is statutory giving it priority over most other liens." *Id.* at 193.

88. On retaining liens, see John Leubsdorf, *Against Lawyer Retaining Liens*, 72 FORDHAM L. REV. 849 (2004). Retaining liens are approved in almost all the jurisdictions: "[A]uthority in all but a few states upholds it, and lawyers continue to use it." *Id.* at 849. There are exceptions: "Five jurisdictions reject the lien, five limit it, and five appear to have no relevant authority. In a handful of cases, federal legislation has been held to preempt state retaining lien law." *Id.* at 851. Retaining liens are specifically authorized by the rules of professional conduct. *Id.* at 850 (citing MODEL RULES OF PROF'L CONDUCT r. 1.8(j)(1), 1.16(d) (AM. BAR ASS'N 2016)). The author compares the U.S. situation to the approach of several other jurisdictions: "Retaining liens are by no means a universal perquisite of the world's legal professions." and qualifies the retaining liens in the United States as "unfair." *Id.* at 851, 854. The author welcomes some jurisdiction's temperament of the retaining lien—"South Carolina's modification of the traditional retaining lien allows lawyers to assert a lien only after balancing a number of factors, including whether the client has clearly agreed to pay the fee, whether the client is able to pay, what less stringent means of enforcement are enforceable, and what prejudice the lien might cause"—but finds it not enough. *Id.* at 876. The author concludes that the retaining lien (which is "too coercive and destructive, yet paradoxically haphazard and ineffective") should be abolished. *Id.* at 883.

89. MODEL RULES OF PROF'L CONDUCT r. 1.8(i).

90. *Id.* at r. 1.8(i)(2).

There are jurisdictions (e.g., New York⁹¹ and Illinois⁹²) that provide statutory liens ("Statutory Lien Jurisdictions"). Sometimes statutes provide that the charging lien arises automatically from the simple fact of having performed a legal job,⁹³ while sometimes lien statutes require that the debtor be notified of the lien to be effective.⁹⁴

Considering that ABA Model Rule 1.8(a) (and its state equivalents) provides that lawyers are not in conflicts of interest when taking a lien over their clients' assets as long as the lien is "authorized by law[.]" in the Statutory Lien Jurisdictions it is certain that lawyers operating in those jurisdictions are certainly not in a conflict of interest in taking a charging lien because the statute makes the lien "authorized by law" for sure. Conversely, if a lawyer operates in a jurisdiction that does not provide a statutory lien ("Nonstatutory Lien Jurisdiction"), then a question of conflict of interest arises and the answer lies in the meaning of the language "authorized by law." One interpretation is that in the absence of a statute, attorneys are *prohibited* from contracting for a lien to secure payment of their fees or expenses. This interpretation seems incorrect because it is inconsistent with the rules of ethics, which allow such liens if stringent requirements are met. The ABA Model Rules preclude a lawyer from entering into a transaction with a client in which the lawyer acquires a "security or other pecuniary interest adverse to a client" unless three requirements are met (i.e., fairness, informed consent, and advice to seek independent counsel).⁹⁵ Therefore, because a lien is a business transaction with a client, at a minimum in a

91. N.Y. JUD. LAW § 475 (McKinney 2017). Attorney's lien in action, special or other proceeding:

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

Id.

92. 770 ILL. COMP. STAT. 5/1 (2003).

93. See, e.g., N.Y. JUD. LAW § 475 (McKinney 2017). Other jurisdictions do not require a notice to enforce the lien. See, e.g., UTAH CODE ANN. § 38-2-7 (LexisNexis 2015).

94. See, e.g., 770 ILL. COMP. STAT. 5/1 (requiring notice to enforce the lien).

95. MODEL RULES OF PROF'L CONDUCT r. 1.8(a).

Nonstatutory Lien Jurisdiction, a lawyer should be able to contract for a lien to secure payment of the lawyer's expenses and fees if the lawyer complies with the requirements of Rule 1.8(a).

In addition, some state courts may have recognized common law liens for fees or expenses even if the requirements of Rule 1.8(a) have not been met. Liens pursuant to such decisions should be treated as "authorized by law." New Mexico is an example of a state that has recognized liens by common law decision and such liens are "authorized by law" under the rules of professional conduct. In *In re Estate of Roybal*,⁹⁶ the court explained that:

Charging liens in New Mexico "have their origin in common law and are governed by equitable principles." An attorney's charging lien is the "attorney's right to recover his fees and money expended on behalf of his client from a fund recovered by his efforts." Authority to enforce a charging lien arises in equity rather than purely in contract, and the court may inquire into the reasonableness of the fee. "The common-law attorney charging lien is not a mortgage and it is not akin to any other statutorily recognized lien on real property such as a *lis pendens*." "The lien is subject to the court's equitable discretion for its enforcement," and it is left to the court to "determine whether and to what extent to enforce it."⁹⁷

....

[N.M. R. Ann.] 16-108(J) states that a "contract with a client for a reasonable contingent fee in a civil case," as well as one "acquiring a lien granted by law to secure the lawyer's fee or expenses" are recognized exceptions to the general rule "that a lawyer shall not acquire a proprietary interest."⁹⁸

South Carolina is another example of a jurisdiction that recognizes non-statutory charging liens, but the basis of the lien in South Carolina is different from that of New Mexico.⁹⁹ The lien in New Mexico appears to be equitably based and does not require an agreement between the lawyer and client. In contrast, South Carolina recognizes a nonstatutory, noncontractual, common law lien for expenses and a nonstatutory, contractual lien for fees.¹⁰⁰

96. *In re Estate of Roybal*, 191 P.3d 537 (N.M. Ct. App. 2008).

97. *Id.* at 541, 545 (citing *Sowder v. Sowder*, 977 P.2d 1034, 1037 (1999); *N. Pueblos Enters. v. Montgomery*, 644 P.2d 1036, 1038 (1982); *Philipbar v. Philipbar*, 980 P.2d 1075, 1079 (1999)).

98. *Id.* at 545 (internal citations omitted).

99. Compare *Eleazer v. Hardaway Concrete Co.*, 315 S.E.2d 174 (S.C. Ct. App. 1984), with *In re Estate of Roybal*, 191 P.3d 537.

100. *Eleazer*, 315 S.E.2d at 177.

While South Carolina recognizes an attorney's lien created by the common law, the lien protects only costs and disbursements; it does not cover an attorney's fee

. . . A lien for the payment of an attorney's fee out of the proceeds of a judgment obtained as a result of an attorney's efforts, however, may be created by an express agreement between an attorney and his client.¹⁰¹

In South Carolina an action to enforce the lien is an action in equity, while an action for damages for failure to pay fees is an action at law.¹⁰²

In both New Mexico and South Carolina, the proceeding to enforce the lien is equitable in nature, with the court's discretion playing an important part. In addition, since these claims are equitably based, they would be tried to a judge rather than a jury.¹⁰³

It is also important to remember that, depending on jurisdiction, there might be other instruments to obtain a result similar to a lien. For example, there is case law to the effect that even if a lawyer fails to obtain a statutory lien, the lawyer may have an equitable lien if the client has "assigned" the lawyer a portion of the settlement fund (equitable assignment of settlement fund)—i.e. basically a contractually created a lien.¹⁰⁴

b. The Case Law on Conflict of Lien Laws

There are situations in which the law of more than one jurisdiction comes into play when deciding whether a lawyer rightfully has a lien to secure the lawyers' fees and expenses. Because of the wide differences between the several jurisdictions, understanding which law controls the relationship between lawyer and client is important for determining the existence of a lien, the proceeding to enforce the lien, and the alternative instruments available, such as assignment, in cases where a statutory lien is not available.

The Encyclopedia of American Jurisprudence states "[t]he existence and effect of an attorney's lien is governed by the law of the place in which contract between the attorney and the client is to be performed."¹⁰⁵

101. *Id.* at 177.

102. See *Lester v. Dawson*, 491 S.E.2d 240, 243 (S.C. 1997). The issue in *Lester* was whether an action for fee recovery was an action at law or in equity. *Id.* at 243. The court differentiated the action to exercise the lien (which was an action in equity) from a pure action to recover fees, which is an action at law. "[A]n ordinary action to recover attorneys' fees pursuant to a fee agreement between the attorney and his client is an action in law with the right to a jury trial." *Id.*

103. Compare *In re Estate of Roybal*, 191 P.3d 537, with *Lester*, 491 S.E.2d at 243.

104. *Wegner v. Arnold*, 713 N.E.2d 247, 251–52 (Ill. App. Ct. 1999).

105. 7 AM. JUR. 2D *Attorneys at Law* § 338 (2017).

However, this language is not particularly useful to determine which lien law should apply because it leaves open the question of where "the legal services are to be performed," which is especially an issue when a law firm is located in one state and represents clients in different states. Some case law is useful to answer the question. *Istim, Inc. v. Chemical Bank*,¹⁰⁶ *In re Engage*,¹⁰⁷ and *Engage Inc. v. Jalbert*¹⁰⁸ represent examples of these situations.

Istim is a case that ended with a quite favorable result for the law firm (recognition of a lien for the New York law firm Willkie Farr & Gallagher—"Willkie"), but the law firm had to litigate to the New York Court of Appeals to have its lien enforced because both the New York Supreme Court and the Appellate Division (First Department) turned down the firm's claim.¹⁰⁹

Willkie represented a client (Coronet Enterprise) in a lawsuit in Illinois (against ETX Petroleum Corp.) and acted as an escrow agent for the settlement funds of that lawsuit (with funds held by Chemical Bank in New York). Coronet allegedly promised Istim, Inc.—which had loaned \$1,000,000 to Coronet—that Coronet would be repaying its loan with the settlement funds from its Illinois lawsuit. After Istim obtained a default judgment against Coronet in New York for Coronet's failure to repay its debt, Istim commenced a special proceeding to obtain the funds held by Wilkie from the Illinois action.¹¹⁰ Willkie requested the dismissal of Istim's petition and filed a cross motion for summary judgment to enforce "its statutory lien on the settlement funds pursuant to Judiciary Law § 475 or its retaining lien pursuant to New York common law."¹¹¹ The Supreme Court applied Illinois law and ordered the funds turned over to Istim;¹¹² the court found that Wilkie had failed to obtain a lien because it had not given notice required by the Illinois lien statute.¹¹³ The Appellate Division (First Department) affirmed; Willkie appealed.¹¹⁴

106. *Istim, Inc. v. Chem. Bank*, 581 N.E.2d 1042 (N.Y. 1991).

107. *In re Engage, Inc.*, 315 B.R. 208 (Bankr. D. Mass. 2004).

108. *In re Engage Inc.*, 330 B.R. 5 (D. Mass. 2005).

109. *Istim, Inc.*, 581 N.E.2d at 1043.

110. *Id.*

111. *Id.*

112. The Supreme Court applied the interests analysis approach to choice-of-law and found that "Illinois' interests and contacts were more significant than New York's." *Id.*

113. *Id.*

Attorneys at law shall have a lien upon all claims, demands and causes of action [] upon which suit or action has been instituted [] for a reasonable fee, for the services of such suits, claims, demands or causes of action, plus costs and expenses. To enforce such lien, such attorneys shall serve notice in writing, which service may be made by registered or certified mail, upon the

The Court of Appeals specified the approach to choice-of-law issues that it would be using:¹¹⁵ the interests-analysis approach, which the court noted was of "general application."¹¹⁶

Under the "interests analysis" approach, "the law of the jurisdiction having the greatest interest in the litigation will be applied and . . . the [only] facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict."¹¹⁷

The court noted that the turnover litigation had been brought in New York by a New York corporation against a New York law firm, under New York law, seeking to attach settlement funds located in New York "based on a default judgment in a debt action which Istim also chose to bring in New York."¹¹⁸ In contrast, the court found the connection with Illinois to be "essentially historical[.]"¹¹⁹ The lower court was wrong in focusing on the Illinois lawsuit because this is not the "the typical attorney's lien dispute between an attorney and a client or a party to the litigation upon which the lien is based where focusing upon the underlying litigation would be appropriate."¹²⁰ In this situation, "[t]he

party against whom their clients may have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes of action. Such lien shall attach to any verdict, judgment or order entered and to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the notice.

Id. at 1043, n.2 (citing 770 ILL. COMP. STAT. 5/1 (2003)).

114. *Istim*, 581 N.E.2d at 1043.

115. *Id.* at 1044. The Court explained that the traditional approach was the territorial approach, which applied the law of the "geographical place where one key event occurred, such as the place of the wrong in tort cases or where an agreement was entered into or performed in contract cases." *Id.* This is not the approach currently followed by courts in New York. *Id.* The leading cases changing the approach were *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954), and *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963). *Istim*, 581 N.E.2d at 1044. In *Auten*, the court "adopted the more flexible 'center of gravity' or 'grouping of contacts' theory." *Id.* "An even more flexible approach often called 'interests analysis' was utilized in *Babcock*, a tort case in which the Court stated that choice-of-law questions are governed by the 'law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.'" *Id.* (internal citations omitted).

116. *Id.* at 1044.

117. *Id.* (internal citations omitted) (quoting *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (N.Y. 1985)).

118. *Id.*

119. *Id.*

120. *Id.*

parties to the Illinois lawsuit, Coronet and ETX, have no interest in the present proceeding.”¹²¹

The court then looked to the policies underlying the Illinois and New York statute to “determine which State has the greater interest in having its law applied.”¹²² The court noted that both the New York lien statute and the Illinois statute have the same basic purpose—to give lawyers the “means to enforce the right to their fees”¹²³—but the Illinois “provision for notice to the judgment debtor in the action in which the lien was obtained is intended to benefit the judgment debtor.”¹²⁴ Here, however, “the judgment debtor in the Illinois lawsuit, ETX—not a party to the instant dispute—has nothing to do with Willkie’s enforcement of its attorney’s lien. Therefore, whatever interest Illinois might have had in requiring Willkie to give notice to ETX is not now applicable.”¹²⁵ Indeed, “Willkie [was] not seeking to enforce its lien against ETX.”¹²⁶

Because Illinois’ policy of requiring notice to judgment debtors is irrelevant, the only relevant policy interest is that of New York in having its attorneys fairly compensated.

New York has more than sufficient interest to justify application of its statutory policy. As previously noted, both parties, the settlement fund and the significant proceedings are all in New York. Even more importantly, New York’s undisputed interest in protecting its attorneys’ ability to be paid for legal services rendered is paramount and, in the circumstances of this case, there is no contrary interest in another State to suggest that New York’s policies should not control.¹²⁷

As a result of its choice of law analysis based on the respective interests of Illinois and New York, the court applied the New York lien statute (section 475 of the Judiciary Law)—which does not require any notice to enforce a lien—and recognized Wilkie’s lien.¹²⁸

In *In re Engage*,¹²⁹ Engage, Inc. and five of its wholly-owned domestic subsidiaries filed a voluntary Chapter 11 bankruptcy petition. Ropes & Gray, a law firm that had provided legal services to the group in connection with the prosecution of various patents, filed a secured claim and was scheduled as a creditor in the bankruptcy. Shortly after the

121. *Id.*

122. *Id.*

123. *Id.* at 1044–45.

124. *Istim*, 581 N.E.2d at 1045.

125. *Id.* at 1045.

126. *Id.*

127. *Id.*

128. *Id.* at 1045.

129. *In re Engage*, Inc., 315 B.R. 208 (Bankr. D. Mass. 2004).

voluntary Chapter 11 petition was filed, the assets of Engage and its subsidiaries were sold to JDA Software Group, Inc.¹³⁰ Ropes filed a claim in the amount of \$108,737.11.¹³¹ The firm claimed that it had a charging lien pursuant to Massachusetts Law¹³² "in (i) certain patents and patent prosecution actions of the Debtor and (ii) cash proceeds of a prepetition sale of other patents."¹³³ The liquidating supervisor objected to the claim.¹³⁴ The issue in front of the court was whether the Massachusetts charging lien statute applied to proceeds derived from the sale of patents and patent applications. The court held that it did not.¹³⁵

To decide the issue of first impression of whether Ropes had a charging lien under Massachusetts law, the court found that the most important element is whether Massachusetts law applies as the substantive law.¹³⁶ The court noted that neither party even raised the possibility that a different substantive law might apply to the dispute.¹³⁷ Under that perspective, while the law firm's office was located in Massachusetts, the administrative proceedings on which the liens were based took place before the United States Patent and Trademark Office in Virginia.¹³⁸

The law firm relied on two cases: *Schroeder, Siegfried, Ryan & Vidas v. Modern Elec. Prods.*,¹³⁹ and *Hedman, Gibson & Costigan, P.C.*

130. *Id.* at 210.

131. *Id.*

132. MASS. GEN. LAWS ch. 221, § 50 (2015):

From the authorized commencement of an action, counterclaim or other proceeding in any court, or appearance in any proceeding before any state or federal department, board or commission, the attorney who appears for a client in such proceeding shall have a lien for his reasonable fees and expenses upon his client's cause of action, counterclaim or claim, upon the judgment, decree or other order in his client's favor entered or made in such proceeding, and upon the proceeds derived therefrom. Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien; provided, that the provisions of this sentence shall not apply to any case where the method of the determination of attorneys' fees is otherwise expressly provided by statute.

Id.

133. *In re Engage, Inc.*, 315 B.R. at 210.

134. *Id.* at 211.

135. *Id.*

136. *Id.*

137. *Id.* at 211.

138. *Id.*

139. *Schroeder, Siegfried, Ryan & Vidas v. Modern Elec. Prods.*, 295 N.W.2d 514 (Minn. 1980).

v. *Tri-Tech Systems International, Inc.*¹⁴⁰ The court noted that in both cases the attorneys had sued trying to enforce a lien under the law of the place in which their offices were located (exactly as Ropes was trying to do here) but “at no point did either court rule that this is the controlling factor”¹⁴¹ The court concluded that in that case, the law of the lawyer’s office is *not* the controlling factor.¹⁴² Relying on *In re Fitterer Engineering Associates, Inc.*,¹⁴³ the court held that the substantive law that should apply to a given proceeding should be identified by looking to the “law of the state in which the legal services are to be performed,”¹⁴⁴ which in the case of litigation would be the place where the judgment was obtained.¹⁴⁵

The court pointed out that “the law of the jurisdiction where judgment entered should control seems obvious: but for the judgment, there is no right to enforce a charging lien. Applying Massachusetts choice of law for contract actions leads to the same conclusion.”¹⁴⁶

While the court recognized that, in contract matters, Massachusetts follows a functional approach (and that there were more contacts with Massachusetts than Virginia), the court decided that Virginia law applied:

Although the only contact with Virginia may be that the Patent and Trademark Office is located there, the filing of the patent applications and obtaining of some patents are fundamental to Ropes’ assertion of its lien. But for the patent applications, all of the fees are unsecured.

140. Hedman, Gibson & Costigan, P.C. v. Tri-Tech Sys. Int’l, 1994 U.S. Dist. LEXIS 376 (S.D.N.Y. 1994), *modified by* 1995 U.S. Dist. LEXIS 13538 (S.D.N.Y. 1995).

141. *In re Engage, Inc.*, 315 B.R. at 211.

142. *Id.*

143. *In re Fitterer Engineering Associates, Inc.*, 27 B.R. 878, 879–80 (Bankr. E.D. Mich. 1983).

144. *In re Engage, Inc.*, 315 B.R. at 212.

145. *Id.* See also John S. McCann, *The Attorney’s Lien in Massachusetts*, 69 MASS. L. REV. 68, 75 (1984) (opining that you should look at the law “where the judgment was recovered rather than the law of the state where the collection is attempted”). Similar reasoning has been used in other cases. See *Lehigh & N.E.R. Co. v. Finnerty*, 61 F.2d 289, 290 (3d Cir. 1932) (holding that “[t]he contract does not expressly state where the parties intended that suit should be brought, but the employment of an attorney of New Jersey and the bringing of suit in New Jersey indicate that the parties intended that from the first that suit should be brought in that state. And being brought there, the laws of that state control as to the lien.”). See also *United States v. 72.71 Acres of Land*, 167 F. Supp. 512, 516 (D. Md. 1958) (applying Maryland law in federal condemnation proceeding brought in Maryland and “where the attorneys’ contract for compensation was made in and intended to be performed mostly in Maryland”); E.H. Schopler, *Conflict of Laws as to Attorneys’ Liens*, 59 A.L.R. 2d 564 (1954).

146. *In re Engage, Inc.*, 315 B.R. at 212.

Therefore, while there are more contacts with Massachusetts, the Court finds that the most significant and meaningful one is with Virginia.¹⁴⁷

This finding had a consequence. The Virginia lien statute was far more limited than the Massachusetts statute.¹⁴⁸ Virginia requires a contract for the creation of the charging lien and grants lawyers a lien only in respect to actions based upon tort or contract claims or in divorce actions.¹⁴⁹ Under Virginia law, therefore, Ropes & Gray did not have a lien for the law firm.¹⁵⁰ In addition, the court pointed out that even if Massachusetts lien law had applied, the law firm would not have a lien anyway.¹⁵¹ Indeed, the Massachusetts statute requires a "judgment, decree or other Order" to be entered in favor of the attorney's client; the court interpreted that language to mean a monetary judgment and refused to consider the patent judgment as covered by the statute ("A patent does not order anyone to do anything or pay any money.").¹⁵²

The decision was affirmed by the district court, which found that Ropes did not have a lien, but on different grounds.¹⁵³ Unlike the bankruptcy court, the district court found that Massachusetts and not Virginia law applied.¹⁵⁴ The district court criticized the bankruptcy court

147. *Id.* at 213.

148. *Id.*

149. VA. CODE ANN. § 54.1-3932 (2006).

A. Any person having or claiming a right of action sounding in tort, or for liquidated or unliquidated damages on contract or for a cause of action for annulment or divorce, may contract with any attorney to prosecute the same, and the attorney shall have a lien upon the cause of action as security for his fees for any services rendered in relation to the cause or action or claim. When any such contract is made, and written notice of the claim of such lien is given to the opposite party, his attorney or agent, any settlement or adjustment of the cause of action shall affect the existing law in respect to champertous contracts. In causes of action for annulment or divorce, an attorney may not exercise his claim until the divorce judgment is final and all residual disputes regarding marital property are concluded. Nothing in this section shall affect the existing law in respect to exemptions from creditor process under federal or state law.

Id.

150. *In re Engage, Inc.*, 315 B.R. at 213.

151. *Id.*

152. *Id.* at 214 ("Since allowance of the applications did not itself require or trigger the payment of any money and no judgment, decree or other order entered in connection with Ropes' representation, it thus follows that no charging lien attached.")

153. *In re Engage Inc.*, 330 B.R. 5 (D. Mass. 2005).

154. *Id.*

I depart from the Bankruptcy Court to conclude that the attorney's lien statute of Massachusetts, not Virginia, governs this action. I agree, however, with the Bankruptcy Court's alternative holding that no attorney's lien can arise in this case under Massachusetts law because patent prosecution before the USPTO

for not having analyzed whether to apply the choice of law of the forum state or the federal choice of law but found that the two would have been the same (“multiple factor, interest analysis” or most “significant relationship” analysis exemplified by the Restatement (Second) of Conflict of Laws (1971)).¹⁵⁵ Another mistake of the bankruptcy court was, instead, more significant. By referring to the applicable test as “significant contacts, rather than as significant relationship, the Bankruptcy Court appears to have focused too narrowly on where the most significant contact was found rather than on the state with the most significant relationship to the transaction.”¹⁵⁶ Under this correct interpretation, Virginia law does not apply.

The district court discussed two provisions of the Restatement (Second) of Conflict of Laws: one dealing with the case in which there is no COL clause in a contract¹⁵⁷ and the general choice of law principles listed in section 6(2)¹⁵⁸ and concluded that Massachusetts Law should apply:

cannot, by definition, yield the ‘judgment, decree or other order’ necessary for a lien under this law to become enforceable. Accordingly, the decision of the Bankruptcy Court denying R&G a secured claim will be affirmed.

Id. at 7.

155. *Id.* at 10.

156. *Id.* at 14.

157. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971). Subsection (1) sets forth the “significant relationship” test with respect to the parties and the transaction. Subsection (2) provides that in the absence of an effective COL, the general choice-of-law factors set forth in §6(2) along with the following factors should be considered in determining which law has the most significant relationship:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract,
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Id.

158. *Id.* § 6. Subsection (2) sets forth general choice-of-law principles that apply in the absence of constitutional limitation or statutory directive:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states
- in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability, and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

A broader consideration of the relevant §188(2) contacts leads to the conclusion that Massachusetts is the state with “the most significant relationship to the transaction and the parties under the principles stated in §6” and its laws will determine “[t]he rights and duties of the parties with respect to an issue in contract.” Without mentioning the § 6 principles or discussing how they applied, the Bankruptcy Court concluded that the “most significant and meaningful” *contact* was with Virginia because the patent applications and patents “fundamental to Ropes’ assertion of its lien” were filed and obtained at the federal Patent and Trademark Office in Virginia. I find this conclusion to be clearly erroneous.¹⁵⁹

The court distinguished the bringing of a proceeding in a Virginia court from the patent application before the USPTO, which *happened* to be brought in Virginia: “The fundamental distinction to be drawn is that the USPTO is a nationwide federal administrative *agency*, not a court sitting within a particular state.”¹⁶⁰ Policy reasons also suggest that Virginia law should not apply because there is no indication that “Virginia would have an interest in this particular issue in the first place, much less why its interest should be found paramount.”¹⁶¹ Massachusetts has the predominant interest under the Restatement (Second) of Conflict of Laws (the relevant policies of the forum):

Id.

159. *In re Engage Inc.*, 330 B.R. at 11 (internal citations omitted).

160. *Id.* The court stated that:

Proceedings in the USPTO are governed by its own laws, rules, Code of Professional Responsibility, and admissions standards, which allow for attorneys and non-attorneys alike to register to practice before the Office. Unlike the customary approach of the local rules of United States District Courts, they do not incorporate particular state rules by reference.

Id. The court also raised the issue that allowing the application of Virginia lien law to an underlying patent proceeding would create a dangerous situation in which the USPTO around the country could be bound to apply Virginia lien statute. *See id.* “Such a holding potentially would give nationwide effect, at least within this federal field of practice, to the policy determination of a single state regarding the tools available for attorneys to collect fees for work performed.” *Id.*

161. *Id.* at 12 (internal quotation marks omitted). The court explained further:

No Virginia parties or counsel appeared in the federal administrative proceedings at issue, no Virginia law was applied, and none of Virginia’s mechanisms for regulating the legal profession were employed. In a head-to-head comparison with Massachusetts, whose attorneys appeared in the action, it is difficult to see how Virginia law should prevail.

Id.

[I]f Virginia attorney's lien law applies to all proceedings in the USPTO, it would not be possible for R & G—or for an attorney from any other state, for that matter—to effect a lien based on representing a client in that forum. The Consolidated Patent Rules applicable to patent prosecution proceedings in the USPTO indicate that the forum contemplated a different result.¹⁶²

By carving out an exception for attorney's liens from the general prohibition against practitioners "acquiring a proprietary interest" in patent claims they prosecute for clients in the USPTO, the USPTO itself clearly indicated a policy choice permitting attorney's liens "granted by law." A determination that Virginia law regarding such liens governs all proceedings before the USPTO would render this choice a nullity.¹⁶³

In addition, the court noted how the Massachusetts Supreme Court has found that "protection of [parties'] justified expectations"¹⁶⁴ was a "significant consideration"¹⁶⁵ in choice of law, while the case law cited by the defendant to support the application of Virginia lien law implicates "intent and expectation" of the parties, which is not the case here.¹⁶⁶ In fact, in that case law, the attorneys were on notice that the law of the place in which they purposefully brought the action (state or federal) should regulate the relationship with the client,¹⁶⁷ while Ropes here was not in the position to choose the place where the proceeding would be brought.¹⁶⁸

162. *Id.* at 12. The court referred to the particular patent rule below:

(a) A practitioner shall not acquire a proprietary interest in the subject matter of a proceeding before the Office which the practitioner is conducting for a client, except that the practitioner may:

- (1) Acquire a lien granted by law to secure the practitioner's fee or expenses; or
- (2) Contract with a client for a reasonable contingent fee; or
- (3) In a patent case, take an interest in the patent as part of all of his or her fee.

Id. (quoting 37 C.F.R. § 10.64 (2005)) (now codified in 37 C.F.R. § 11.108(i) (2017)).

163. *Id.* at 13.

164. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d) (AM. LAW INST. 1971)).

165. *Id.* (citing *Bushkin Assoc., Inc. v. Raytheon Co.*, 473 N.E.2d 662 (Mass. 1985)).

166. *Id.*

167. *Id.* at 13–14 (quoting *In re American Metrocomm Corp.*, 274 B.R. 641, 662 (Bankr. D. Del. 2002); then citing *Lehigh & N.E. R. Co. v. Finnerty*, 61 F.2d 289, 290 (3d Cir. 1932); and then citing *Hoxsey v. Hoffpauir*, 180 F.2d 84, 86 (5th Cir. 1950)).

168. *Id.* at 14. The court clarified that the USPTO was governed by its own standards:

The court concluded that, “pursuant to the ‘most significant relationship’ choice of law analysis applicable under both Massachusetts law and federal common law . . . the USPTO proceedings at issue were governed by the attorney’s lien law of Massachusetts, not Virginia.”¹⁶⁹

The application of Massachusetts law, however, did not bring a favorable result for the attorneys, at least initially: The district court found that Ropes did not acquire a lien because the statute—at least as the court interpreted it—does not grant a lien in patent prosecution work.¹⁷⁰ Even conceding that it was possible to acquire such a lien, Ropes would have had to overcome a further burden: because the patents on which Ropes asserted a lien had been sold, Ropes would have needed to attach the lien to the proceeds, but the court found that this

[T]he USPTO has its own standards of admission and Code of Professional Responsibility. Proceedings before the USPTO are governed by the agency’s own rules and regulations. Attorneys appearing before the USPTO, therefore, would have a “justified expectation” of being subject to the USPTO rules of professional conduct. Absent some other basis—for example, being admitted to practice in Virginia, representing a client from Virginia, specifically agreeing with a client that Virginia law governed the representation—an attorney representing a client before the USPTO would have no rational basis for supposing that Virginia attorney’s lien law governed the representation.

Furthermore—and in contrast to an attorney representing a client in state or federal court proceedings in Virginia—an attorney appearing in the USPTO would have received no prior notice that Virginia law might apply [T]he caselaw . . . contains not a single ruling . . . holding that proceedings in the USPTO are governed by Virginia attorney’s lien law, or any other aspect of Virginia law for that matter.

Id.

169. *In re Engage Inc.*, 330 B.R. at 14.

170. *Id.* at 16. The court concluded that Ropes did not have a lien (choate or inchoate) “on the proceeds of [the] patents, applications” and patent prosecution actions pursuant to Mass. Gen. Laws ch. 221, § 50, because patent prosecution actions in the USPTO, by definition, cannot yield the sort of judgment, decree, or order required for such a lien to be perfected. *Id.* at 16, 20 (internal quotation marks and parentheses omitted). The court cited to precedents of the Massachusetts Supreme Court which clarified when a charging lien is possible—“a charging lien which binds the judgment or money decree for payment of expenses incurred and for services rendered by an attorney with respect to the particular action or suit.” *Id.* at 16 (quoting *Torphy v. Reder*, 257 N.E.2d 435 (Mass. 1970)). The court disagreed with Ropes that there would be precedent in Massachusetts to the effect that a charging lien is possible, not only on a money judgment, but also “on economically valuable assets that are created by virtue of that attorney’s services.” *Id.* at 17. Ropes relied on *Webber v. Napolitano*, 71 N.E.2d 612 (Mass. 1947), but in the view of the court, the decision (dealing with a lawyer who had obtained a lodging house license for his client from the City of Boston Licensing Board and had then retained possession of that license to obtain payment for his fees from his client) could not support Ropes’s reading that the Massachusetts lien statute would allow a lien on values different from a money judgment (in *Webber*, “the [lien] statute was immaterial to the outcome.”). *In re Engage Inc.*, 330 B.R. at 17.

reading of the statute was supported “neither by precedent or by logic.”¹⁷¹ The court also agreed with the defendant that while the statute connected the lien to the “claim,” the proceeds of the patents’ sale (which was the value that Ropes sought to attach) “stem from the underlying intellectual property of the Debtor, not from the ‘claim’ it made before the USPTO for a patent protecting that property.”¹⁷²

In conclusion, the court found “that no attorney’s lien under Mass. Gen. Laws ch. 221, § 50, attached in favor of R & G to the patents, patent applications, or proceeds from the sale of the same, based on R & G’s representation of the Debtor in patent prosecution proceedings before the USPTO.”¹⁷³

Ropes & Gray appealed the district court’s decision to the First Circuit,¹⁷⁴ which found that the Massachusetts lien statute was unclear on whether it applied to interests in property like patents and, if so, whether the lien attached to the proceeds resulting from the sale of the property.¹⁷⁵ The court certified these issues to the Massachusetts Supreme Judicial Court (“SJC”).¹⁷⁶ The SJC answered both questions affirmatively, upholding Ropes’s claimed lien.¹⁷⁷

C. Considerations Drawn from the Case Law

Istim,¹⁷⁸ *In re Engage*,¹⁷⁹ and *Ropes*¹⁸⁰ are interesting in several aspects. First, the cases show how detailed the lien statutes (and the relevant case law) are, and therefore highlight the importance of identifying the correct law that applies to a situation. The New York, Illinois, Massachusetts, and Virginia lien statutes are significantly

171. *In re Engage Inc.*, 330 B.R. at 18. The court noted the statute’s language, that “the proceeds derived therefrom” modifies not only “judgment, decree or other order” but also “cause of action, counterclaim or claim.” *Id.* This reading had already been rejected in *In re Leading Edge Products, Inc.*, 121 B.R. 128, 131 (Bankr. D. Mass. 1990), *aff’d* 1991 U.S. Dist. LEXIS 7597 (D. Mass. 1991). *In re Engage Inc.*, 330 B.R. at 18.

172. *In re Engage Inc.*, 330 B.R. at 20.

173. *Id.* This is not the situation everywhere. In *Ropes*, the court pointed out that there are jurisdictions that grant a lien on patents, specifying that this is not the case for Massachusetts: “Minnesota and New York [] have held that their own attorney’s lien law applies to representation of clients in patent proceedings before the USPTO.” *Id.* at 12 (citing *Schroeder, Siegfried, Ryan & Vidas v. Modern Elec. Products, Inc.*, 295 N.W.2d 514, 516 (Minn. 1980); *Hedman, Gibson & Costigan, P.C. v. Tri-Tech Sys. Int’l Inc.*, 1994 U.S. Dist. LEXIS 376 (S.D.N.Y. Jan. 14, 1994), *modified by* 1995 U.S. Dist. LEXIS 13538 (S.D.N.Y. Sept. 18, 1995)).

174. *In re Engage, Inc.*, 544 F.3d 50 (1st Cir. 2008).

175. *Id.* at 57.

176. *Id.* at 58.

177. *Ropes & Gray LLP v. Jalbert*, 910 N.E.2d 330 (Mass. 2009).

178. *Istim, Inc. v. Chemical Bank*, 581 N.E.2d 1042 (N.Y. 1991).

179. *In re Engage, Inc.*, 315 B.R. 208 (Bankr. D. Mass. 2004).

180. *In re Engage Inc.*, 330 B.R. 5 (D. Mass. 2005).

different from one another. In *In re Engage*¹⁸¹ and *Ropes*,¹⁸² the difference between the Massachusetts and Virginia lien statutes did not influence the result for the law firm (no lien under both), while in *Istim*,¹⁸³ the application of New York lien statute instead of Illinois did make a difference for the law firm.

Lawyers should remember that some jurisdictions grant a lien to lawyers without requiring a lien contract with the client,¹⁸⁴ while others require a specific lien contract between the lawyer and the client.¹⁸⁵ Further, some lien statutes require a notice to the debtor,¹⁸⁶ while others do not.¹⁸⁷ There are jurisdictions that do not have an attorney lien statute in place, and in those jurisdictions the lien is a creature of contract recognized by courts.¹⁸⁸ There are statutes (as interpreted by the relevant

181. *In re Engage, Inc.*, 315 B.R. at 208.

182. *In re Engage Inc.*, 330 B.R. at 5.

183. *Istim*, 581 N.E.2d at 1042.

184. MASS. GEN. LAWS ch. 221, § 50 (2015); N.Y. JUD. LAW § 475 (McKinney 2017); UTAH CODE ANN. § 38-2-7(2) (LexisNexis 2015); 770 ILL. COMP. STAT. 5/1 (2003). With regard to Massachusetts, the bankruptcy court has stated that "when an attorney commences an action on behalf of his client in a state or federal court or agency, an inchoate lien enters in the attorney's favor. The lien matures and becomes choate when a judgment, decree or other order is entered in the client's favor." *In re Engage, Inc.*, 315 B.R. at 214 (internal citations omitted).

185. VA. CODE ANN. § 54.1-3932 (2006).

186. 770 ILL. COMP. STAT. 5/1 (2003).

187. N.Y. JUD. LAW § 475.

188. *Fletcher v. Davis*, 90 P.3d 1216 (Cal. 2004); Gelfand, Greer, Popko & Miller v. Shivenor, 30 Cal. App. 3d 364 (1973); see also David Angeloff, *A Primer on the Attorney's Lien*, CAL. LAWYER (Dec. 3, 2015), <http://www.callawyer.com/2015/12/a-primer-on-the-attorneys-lien>.

One coauthor of this article has summarized South Carolina law on attorney liens as follows:

South Carolina law authorizes lawyer charging liens on the proceeds of any settlement or judgment . . . but does not appear to expressly authorize liens on the subject matter of litigation. A South Carolina opinion holds that a lawyer may not take a security interest in property when title to the property is the subject of litigation. See S.C. Bar Ethics Adv. Op. #96-25.

See ROBERT M. WILCOX & NATHAN M. CRYSTAL, ANN. S.C. RULES OF PROF. CONDUCT 145 (2016).

The court of appeals has indicated that a common-law charging lien may be asserted to recover costs and disbursements, but not to recover attorney fees. However, the lawyer and client may agree expressly to a lien allowing the lawyer to recover fees out of the judgment or settlement. *Eleazer v. Hardaway Concrete Co., Inc.*, 281 S.C. 344, 315 S.E.2d 174 (Ct. App. 1984). The supreme court cited *Eleazer* with approval in *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997). See also *In re Christian*, 267 S.C. 410, 228 S.E.2d 677 (1976) (excess funds of client applied toward expenses of that and prior transactions).

case law) that are quite broad and cover beyond money decisions,¹⁸⁹ for example patent applications;¹⁹⁰ however, other statutes may not be so broad.

Second, *Istim*,¹⁹¹ *In re Engage*,¹⁹² and *Ropes*¹⁹³ are all good examples of why an attorney who wishes to secure his or her fees should always contract for a lien in the retainer agreement. A broadly crafted contractual lien avoids the difficulty of the choice of law analysis and of the interpretation of the same and it is advisable even in jurisdictions that have enacted a statutory lien. In crafting the clause, a lawyer should specify the scope of the lien and how it relates to potentially applicable statutes.

Third, *In re Engage*¹⁹⁴ and *Ropes*¹⁹⁵ show that the courts tend to defer to state law when perhaps they could find federal preemption. For example, the *Ropes* court chose to give a restrictive reading of a federal rule¹⁹⁶ and to read that rule as simply recognizing the possibility that a state statute could grant a lien on the result of the patent application; in that case, the district court found that Massachusetts law did not recognize such a lien, although that decision was reversed on appeal. These cases show the importance of a favorable state statute even in a federal judicial or administrative proceeding.¹⁹⁷

Fourth, in *Istim*,¹⁹⁸ we see the policy considerations that enter into the decision of identifying which lien law is applicable. While in *Istim*¹⁹⁹ it was quite obvious that New York had an interest in having its law

WILCOX & CRYSTAL at 152–53.

189. See, e.g., N.Y. JUD. LAW § 475. This is probably one of the broadest lien statutes in the country.

190. See *Schroeder, Siegfried, Ryan & Vidas v. Modern Elec. Products, Inc.*, 295 N.W.2d 514, 516 (Minn. 1980); *Hedman, Gibson & Costigan, P.C. v. Tri-Tech Sys. Int'l Inc.*, 1994 U.S. Dist. LEXIS 376 (S.D.N.Y. Jan. 14, 1994), modified by 1995 U.S. Dist. LEXIS 13538 (S.D.N.Y. Sept. 18, 1995), discussed *supra* in note 168.

191. *Istim, Inc. v. Chemical Bank*, 581 N.E.2d 1042 (N.Y. 1991).

192. *In re Engage, Inc.*, 315 B.R. 208 (Bankr. D. Mass. 2004).

193. *In re Engage Inc.*, 330 B.R. 5 (D. Mass. 2005).

194. *In re Engage, Inc.*, 315 B.R. at 208.

195. *In re Engage Inc.*, 330 B.R. at 5.

196. 37 C.F.R. § 10.64 (2005); see also *In re Engage Inc.*, 330 B.R. at 12–13 (quoting 37 C.F.R. § 10.64 (repealed 2013)). This rule is now codified with minor modifications in 37 C.F.R. § 11.108(i) (2017).

197. While the court's interpretation of 37 C.F.R. § 10.64(a)(1) (now codified in 37 C.F.R. § 11.108(i) (2017)) is justified by the language "granted by law" (now "authorized by law"), a better interpretation recognizing the federal interest in uniformity in patent rules would be to read the provision as allowing an attorney to take an interest in a patent, independently of the existence of a state statute to that effect.

198. *Istim, Inc. v. Chem. Bank*, 581 N.E.2d 1042 (N.Y. 1991).

199. *Id.*

applied and Illinois did not, in other cases, the balance-of-interest analysis could cause unexpected results.

Fifth, *In re Engage*²⁰⁰ and *Ropes*²⁰¹ implicitly recognized that a contractual lien would have been enforceable by virtue of a choice-of-law clause. In *In re Engage*, the court specifies:

*In the absence of a choice of law by the parties, their rights are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties*²⁰²

The court then went on to recognize the parties could enter into a choice-of-law clause.²⁰³ The *Ropes* court agreed:

[W]here the parties to a contract *have failed to make an effective choice of law themselves*, the Restatement states that the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include²⁰⁴

These authorities point to the importance of having a COL clause in the retainer agreement, which we discuss in Part III below.

III. THE ENFORCEABILITY OF COL AND COF CLAUSES IN ENGAGEMENT AGREEMENTS?

A. *The Spectrum in the Case Law from Strict Scrutiny to Similar Treatment of Clauses in Commercial Contracts*

Forum selection clauses in lawyer engagement agreements are not *per se* unenforceable. However, courts' decisions show a spectrum of approaches from strict scrutiny of the enforceability of such clauses based on requirements of informed consent and public policy to

200. *In re Engage, Inc.*, 315 B.R. 208 (Bankr. D. Mass. 2004).

201. *In re Engage Inc.*, 330 B.R. 5 (D. Mass. 2005).

202. *In re Engage, Inc.*, 315 B.R. at 213 n.5 (emphasis added) (internal quotation marks omitted) (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 186–87 (AM. LAW INST. 1971)).

203. The court cited with approval E.H. Schopler, *supra* note 145: "The general rule that the true test for the determination of the proper law of contract is, in the absence of a countervailing public policy, the intent of the parties, express or implied, has been applied in deciding questions of choice of law with respect to attorney's liens." *In re Engage, Inc.*, 315 B.R. at 212 (quoting Schopler, *supra*). However, a contract between an attorney and his client does not ordinarily contain express provisions as to the governing law. One of the arguments of this article is that lawyers should include choice-of-law provisions in their engagement agreements.

204. See *In re Engage Inc.*, 330 B.R. at 10 (emphasis added). It is worth mentioning that in *In re Engage*, the bankruptcy court noted that "*Ropes* has not suggested that its contract with the debtor, if it is express, designated Massachusetts law as controlling any fee disputes." *In re Engage, Inc.*, 315 B.R. at 212 n.4.

treatment of such clauses like the ones found in agreements between commercial parties.

*Falk & Fish, L.L.P. v. Pinkston's Lawnmower & Equipment, Inc.*²⁰⁵ is an example of the strict scrutiny that courts give to COF clauses in client-attorney agreements. Pinkston's Lawnmower and Equipment, Inc. ("PLE") was a North Carolina corporation with its principal place of business in North Carolina. Its president Randy Pinkston ("Pinkston") was a North Carolina resident. Attorney Robert Hardy Falk ("Falk") (licensed to practice law in North Carolina and Texas) was the managing partner of Falk Fish, L.L.P. ("Falk Fish"), a Texas law firm. PLE hired Falk to represent it in a lawsuit in North Carolina federal court. Falk represented PLE from October 2005 to March 2006, when the parties entered into an engagement agreement. The lawsuit was not successful; PLE failed to pay for the legal services and Falk sued in Dallas County, Texas, alleging that the engagement agreement contained consent to jurisdiction in Texas.²⁰⁶ The clause read as follows: "You agree our relationship and our agreement is controlled by Texas law, and the applicable courts of Dallas, Texas shall be the *for a* [sic] for all attorney-client disputes."²⁰⁷ Pinkston made a special appearance, contesting jurisdiction and rendering an affidavit stating that Falk had not explained the significance of the clause to him;²⁰⁸ Falk, conversely, testified that he had explained the meaning of the clause to his client but the latter had not read the engagement before signing it.²⁰⁹

The trial court dismissed the complaint for lack of personal jurisdiction. Falk filed a motion for new trial, which was overruled; an appeal followed.²¹⁰ Falk contested the lower court's decision because it failed to consider the engagement agreement's forum selection clause,²¹¹

205. *Falk & Fish, L.L.P. v. Pinkston's Lawnmower & Equip., Inc.*, 317 S.W.3d 523 (Tex. 2010).

206. *Id.* at 525.

207. *Id.*

208. Pinkston's affidavit provided:

At no time before signing the Engagement Agreement did Robert Falk advise me that any dispute between Pinkston Lawnmower and Falk Fish, LLP would have to be resolved in Dallas, Texas. Nor did Mr. Falk advise me that Pinkston Lawnmower, by signing the agreement, was waiving its right to litigate any disputes with Falk Fish, LLP in North Carolina. At the time I signed the Engagement Agreement, I did not understand that Pinkston Lawnmower was agreeing to litigate any disputes with Falk Fish, LLP in Texas and I believed that any such disputes would be resolved in North Carolina.

Id. at 526 (quoting Pinkston's Affidavit).

209. *Id.*

210. *Id.*

211. *Id.*

while PLE contended that "the provision is unintelligible and therefore, unenforceable."²¹²

The Texas Court of Appeals posited that "[f]orum selection clauses are generally enforceable."²¹³ The Court pointed out that while "[t]he plain and unequivocal language of the provision does not include the words 'forum' or 'jurisdiction,' two words commonly included in forum selection clauses . . . [w]ith respect to typographical errors, written contracts will be construed according to the intention of the parties, notwithstanding errors and omissions, by perusing the entire document and to this end, words, names, and phrases obviously intended may be supplied."²¹⁴ Here, the court said, "[a]fter examining the entire agreement as a whole in an effort to harmonize and give effect to the provision in question, we conclude the provision is not ambiguous. The typographical error 'for a' may be interpreted to mean 'forum' and thus give meaning to the provision."²¹⁵

The analysis of the Court did not stop there, however. In the case of an engagement agreement, special considerations are warranted. First, the court expressed concern that an engagement agreement, signed after the representation had started,²¹⁶ required "special scrutiny" because the clause might have been the result of pressure by the lawyer. Second, the Court referred to the need to take into account "ethical considerations."²¹⁷ In particular, a lawyer must maintain "the highest standards of conduct and fair dealing when contracting with a client or otherwise taking a position adverse to the client's interests" and has "the burden of clarifying attorney-client agreements."²¹⁸ This is fair not only because the lawyer is more knowledgeable about (and more experienced with) those agreements, but also because the client trusted him.²¹⁹ Third, recalling the Restatement (Third) of the Law Governing Lawyers § 18 cmt. h, the Court pointed out that "contracts between an attorney and

212. *Id.* at 527. The law firm conceded that the provision contained "a typographical error, 'for a' instead of 'forum,' but argues the omission of the word 'forum' does not matter because Pinkston did not read the contract before signing it." *Id.*

213. *Id.*

214. *Id.* at 527–28.

215. *Falk*, 317 S.W.3d at 528.

216. *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. c (AM. LAW INST. 2000) ("[C]lient lawyer fee contracts entered into after the matter in question is under way are subject to special scrutiny.")). A client might accept such an agreement because it is difficult or expensive to change attorneys after representation has begun or a client might be reluctant to suggest changes to the terms proposed by the attorney in the agreement." *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. c).

217. *Id.*

218. *Id.*

219. *Id.*

client should first be construed from the standpoint of a reasonable person in the client's circumstances," the reason being, among others, that "attorneys are more able than most clients to detect and repair omissions or ambiguities in attorney-client agreements."²²⁰ Fourth, other rules of interpretation matter ("such as the contract language, the circumstances in which the contract was made, the client's sophistication and experience in retaining and compensating attorneys and whether the contract terms were truly negotiated")²²¹ and, in that case, operated to the disadvantage of Falk:

In this case, we do not have a sophisticated and experienced client who vigorously negotiated the fee agreement with his attorney. Instead, the record reflects that Pinkston, who signed the contract as president of PLE, is an unsophisticated and inexperienced individual whose attorney presented an already drafted agreement six months after representation had begun. There is nothing in the record to indicate the agreement was negotiated. According to the record, Pinkston signed the agreement without reading it [E]ven if Pinkston had read the contract prior to signing it, the drafting error by Falk & Fish resulted in a provision that was not a clear forum selection clause.²²²

In conclusion, the Court stated: "Given the language of the contract, the circumstances in which it was made, the client's lack of sophistication and experience in retaining lawyers and the lack of negotiation, we conclude Falk Fish had the burden of ensuring the contract clearly stated any terms that diverged from PLEs expectations."²²³

But this is not all. The court also found that the forum selection clause was unreasonable and unjust in that case because: (i) Pinkston, at the time when it entered into the attorney-client agreement, "did not contemplate litigating in Texas"; (ii) Pinkston had "hired Falk, an attorney licensed in North Carolina, to represent PLE in litigation in North Carolina;" (iii) the agreement did not contain a clear, explicit COF clause; and (iv) the clause had to be "harmonized and interpreted in order to ascertain that it is a forum selection clause" such that there was not "a

220. *Id.* at 529 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. h).

221. *Id.* (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 cmt. h).

222. *Id.* The Court acknowledged that there was a disagreement of fact as to whether Falk explained the clause and its significance to Pinkston, but blamed Falk for how he handled the issue: "We question why Falk did not detect and correct the typographical error at the time he explained to Pinkston that the provision in question meant that any attorney-client disputes would be litigated in the applicable courts of Dallas, Texas." *Id.*

223. *Id.*

mutually agreed forum, or that such forum was foreseeable at the time of contracting.”²²⁴

In conclusion, finding that “the forum selection clause was not clear on its face and required interpretation,” the court concluded that “PLE did not consent to personal jurisdiction in Dallas, Texas.”²²⁵ The court also concluded that “enforcement would be unreasonable or unjust,” and affirmed the lower court’s dismissal.²²⁶

In *Falk*, the problem was not so much the misspelling. *Falk* stands for the proposition that a COL/COF clause requires a client’s informed consent and reasonableness.

The approach used by the *Falk* court has been used by other courts. In *Brown v. Partipilo*,²²⁷ a federal court in the Fourth Circuit held that a forum selection and a choice of law clause were unenforceable for lack of informed consent and on public policy grounds.²²⁸ In that case, unlike *Falk*, there was no misspelling and the language was clear.²²⁹ In 2006, authorities charged Lael Brown, who lived with his father in West Virginia, with several felonies. Brown qualified for court-appointed counsel, and the court appointed Cheryl Warman, a West Virginia attorney, to represent him. Warman reached a plea agreement with the state.²³⁰

Before the plea hearing, Brown’s mother, who was from New York, retained a law firm, named America’s Criminal Defense Group (ACDG), to represent her son. While the law firm’s website—which did not list a mailing or physical address—advertises that the firm practices nationwide and solicits contact through email or a toll-free telephone number, in reality, ACDG is a California firm and Partipilo, its Managing Director, is a California attorney. “[T]he firm offered to represent Brown in exchange for a nonrefundable flat fee of \$27,900.”²³¹ The family (mother, father, and grandfather) pooled their funds to pay this fee and retained ACDG. “ACDG then sent copies of a retainer agreement to all three.”²³² The mother and the grandfather signed the

224. *Id.* at 529–30.

225. *Falk*, 317 S.W.3d at 530.

226. *Id.*

227. *Brown v. Partipilo*, No. 1:10CV110, 2010 U.S. Dist. LEXIS 108106 (N.D.W. Va. Oct. 8, 2010).

228. *Id.* at *13–25.

229. Bruce A. Green, *The Perils of Sloppy Engagement Agreements*, LITIG., Fall 2011, at 6.

230. *Brown*, 2010 U.S. Dist. LEXIS 108106, at *2.

231. *Id.* at *3.

232. *Id.*

agreement, while the father initialed some pages and authorized payments. The client never signed it.²³³

On the day of the hearing, “ACDG contacted Warman to advise her that it had been retained to represent Brown” and that she should ask for a continuance, which she did. On the same day, ACDG associated in the case John Brooks, an attorney practicing in Monongalia County, with whom ACDG had never worked before.²³⁴ Brooks took over the case, reached a plea agreement with the state, and received approximately \$5,400 from ACDG for his services. He “never entered into a separate contract with Brown or any of his relatives;” ACDG never entered an appearance in the case.²³⁵

The Browns sued ACDG and Partipilo, claiming that ACDG’s website and statements fraudulently induced them into signing the contract, that ACDG did not provide a team of experienced attorneys as promised, and that it failed to pursue a jury trial. Plaintiffs sought recovery of the legal fees paid on the grounds that the charges were unreasonable under the West Virginia Rules of Professional Conduct and unconscionable, and that the representation provided by ACDG was negligent (because the law firm failed to investigate the case and to raise a mental illness defense or mitigation argument). The action, initially brought in a West Virginia state court, was removed to federal court.²³⁶

The defendants sought dismissal of the action based on the following COL and COF clause included in the retainer agreement: The “agreement shall be interpreted under the laws of the state of California and jurisdiction and venue shall be exclusively in the county of Los Angeles in the state of California.”²³⁷

The court dismissed offhand plaintiffs’ argument that the father and son were not bound by the contract (and so by the forum selection and choice of law) because they did not sign the agreement; the father obviously agreed and the son was the intended beneficiary.²³⁸ The court also noted that the language of the clause was clear,²³⁹ mandatory (not permissive),²⁴⁰ and not procured by fraud.²⁴¹ The court also found that litigation in California would not deny the plaintiffs a remedy.²⁴²

However, the court ruled that

233. *Id.* at *2–4.

234. *Id.* at *4.

235. *Id.* at *4–5.

236. *Id.* at *5–6.

237. *Id.* at *6.

238. *Id.* at *10–11.

239. *Id.* at *11.

240. *Brown*, 2010 U.S. Dist. LEXIS 108106, at *11.

241. *Id.* at *11–12.

242. *Id.* at *12–13.

[The provision] . . . is not . . . written in the type of plain English that a lawyer could reasonably assume any criminal defendant or his family would understand without explanation. The words 'jurisdiction' and 'venue,' while not ambiguous, are not in common usage outside of the legal world. Moreover, the apparent failure of any ACDG attorney to explain the contract and the plaintiffs' averments that none of them understood the provision's consequences supports a conclusion that the provision was not adequately communicated to the plaintiffs. Under the first element of *Caperton*, [*Caperton v. A.T. Massey Coal Co.*, 223 W. Va. 624, 679 S.E.2d 223, 235 (W. Va. 2008)], therefore, the clause must be set aside.²⁴³

Relying on Restatement (Third) of the Law Governing Lawyers,²⁴⁴ the court noted that an attorney has the duty to "ensure that the client" clearly "understands the nature of the contract and the representation"²⁴⁵ "[T]he attorney is under a duty to deal fairly with the principal in arranging the terms of the employment."²⁴⁶

The court cited *Falk*²⁴⁷ for the principle that attorneys have obligations which are "different from any other businessman's in an arms-length transaction[;]"²⁴⁸ his "standards of conduct and fair dealing" when negotiating with his clients are necessarily higher.²⁴⁹

Here, no attorney from ACDG explained the contract to the plaintiffs The defendants rely on the following language near the end of their contract with the plaintiffs to establish that any failure to understand the agreement is the clients' responsibility:

Please read this agreement carefully. It is important that our agreement be totally complete and that the undersigned

243. *Id.* at *13–14 (citing *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 235 (W. Va. 2008)).

244. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §18, cmt. d (AM. LAW INST. 2000).

245. *Brown*, 2010 U.S. Dist. LEXIS 108106, at *14. The court explained:

When negotiating a contract for representation, an attorney necessarily has a conflict of interest. The lawyer is desirous of fair compensation for his services, but must keep in mind that, even at the outset of the relationship, he is also his client's fiduciary. Thus, the lawyer must carefully ensure that the client understands the nature of the contract and the representation.

Id. (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18, cmt. d).

246. *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18, cmt. e).

247. *Falk & Fish, L.L.P. v. Pinkston's Lawnmower & Equip.*, 317 S.W.3d 523 (Tex. App. 2010).

248. *Brown*, 2010 U.S. Dist. LEXIS 108106, at *15.

249. *Id.* (quoting *Falk & Fish*, 317 S.W.3d at 528).

understands everything before signing. If you have any questions regarding this agreement now is the time to ask. Once this agreement has been signed it will be concluded that the undersigned completely understands it.²⁵⁰

The court continued, noting that "[a] lawyer is free to draft such exculpatory language for a client, but not to shield himself with the legal fiction that, by signing a document, his client actually understands each provision. He cannot disclaim his burden to explain the agreement to the lay client."²⁵¹

The court rejected the position of the defendants that the engagement agreement should be interpreted as "any other agreement to provide services"²⁵² because it cannot "ignore both the inherently unequal nature of the parties' positions and the duty of a lawyer to ensure his client understands the terms of the prospective representation."²⁵³

In conclusion, the court held that because defendants "failed in this duty, they failed to 'reasonably communicate' the forum selection clause to the plaintiffs. *Caperton*, 679 S.E.2d at 236. Accordingly, the plaintiffs are not bound by its terms."²⁵⁴

In addition, the court found the clause also invalid under a public policy perspective.²⁵⁵ The public policy of West Virginia required attorneys representing criminal defendants in the state to be answerable to the courts of the state for their conduct:

This Court must consider the public policy of West Virginia as interpreted by the Supreme Court of Appeals. Applying the policies set forth by that body, any attorney willing to undertake to represent a criminal defendant in West Virginia must make himself available to answer for his actions, or inaction, in the courts of this state, whether in the context of a disciplinary proceeding or in a civil suit to be tried before a jury of West Virginia citizens.²⁵⁶

Enforcement of the clause would undermine this public policy:

Even if the clause had been adequately explained, the agreement as written would preclude West Virginia courts from supervising and sanctioning the conduct of attorneys practicing law within the state. To condone such evasion would substantially undermine this state's

250. *Id.* at *16-17.

251. *Id.* at *17.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at *17-25.

256. *Id.* at *22-23.

ability to protect its citizens from unscrupulous interlopers promising unrealistic results.²⁵⁷

The Court did not deny that in some other contexts a COF clause might be enforceable.²⁵⁸ For example, in other type of disputes with sophisticated clients, a forum selection/choice of law clause might be enforceable.²⁵⁹ But this case involves a criminal defendant, whose representation is an "undertaking . . . of constitutional dimensions and implicates a core function of the judicial system."²⁶⁰

"Just as allowing the assignment of malpractice actions violates the public policy of this State, so too would allowing an attorney to avoid the scrutiny of West Virginia's courts after purporting to provide this type of representation."²⁶¹

In contrast to *Falk* and *Brown*, in other cases attorneys have been successful in enforcing COL/COF clauses. In *Ginter v. Belcher, Prendergast & Laporte*,²⁶² the Fifth Circuit found the COF clause in the parties' attorney-client agreement was enforceable.

Paul and Lisa Ginter, a husband and wife who were residents of South Carolina, twice hired Fred Belcher, a Louisiana family law attorney of the firm of Belcher, Prendergast & Laporte to assist them in the adoption of two children. The second engagement agreement contained a choice-of-law provision (Louisiana law would govern) and the following COF clause: "Any action at law, suit in equity, or other judicial proceeding for the enforcement and/or breach of this contract, or any provision thereof, shall be instituted only in the 19th Judicial District Court of the State of Louisiana."²⁶³ Belcher did not suggest the opportunity to seek independent counsel. The clause came of use when the Ginters discovered that the second child suffered from fetal alcohol syndrome (a consequence of the addiction of the birth mother) and sued Belcher and his law firm in federal district court in Louisiana for malpractice and breach of fiduciary duty, the allegation being that Belcher misrepresented the health of the birth mother and failed to thoroughly investigate the mother's health.²⁶⁴

Belcher filed a motion to dismiss, arguing that the Ginters could only sue in the "19th Judicial District Court of the State of Louisiana,"

257. *Id.* at *17–18.

258. *Brown*, 2010 U.S. Dist. LEXIS 108106, at *23.

259. *Id.* at *23–24 (citing *XR Co. v. Block & Balestri, P.C.*, 44 F. Supp. 2d 1296 (D. Fla. 1999)); *Ginter v. Belcher, Prendergast & Laporte*, 536 F.3d 439 (5th Cir. 2008)).

260. *Id.* at *24.

261. *Id.* at *24–25.

262. *Ginter v. Belcher, Prendergast & Laporte*, 536 F.3d 439 (5th Cir. 2008).

263. *Id.* at 440.

264. *Id.*

and could not sue in federal court. The district court denied the motion, finding that the clause was the result of overreaching (being a business transaction with a client without respecting the requirement of advising to seek independent counsel).²⁶⁵ Belcher appealed, and the Fifth Circuit reversed the dismissal.²⁶⁶

The Court found that the lower court erred in finding overreaching because

the agreement at issue in this case is not a separate "business transaction" between an attorney and client requiring application of the business-transaction rules; instead, all parties agree that it is merely an agreement consummating the attorney-client relationship. The Ginters had no reason to believe that Belcher was using his professional judgment to zealously protect their interests in the very agreement that memorialized their relationship.²⁶⁷

The court also disagreed with the Ginters' argument that this COF clause was unenforceable for violation of Louisiana public policy because the clause was a limitation on Belcher's malpractice liability:

The thrust of the Ginters' argument is that a forum-selection clause limits Belcher's liability because it forces the Ginters to litigate in a forum favorable to Belcher [T]he Ginters argue, they are less likely to recover in state court, and Belcher's attempt to have this case litigated in state court is therefore a limitation on his malpractice liability Nevertheless, we have some conceptual difficulty in stretching the concept of limiting liability to cover situations where an attorney selects a forum where he or she might have some conceivable advantage. Our skepticism is supported by examining how other jurisdictions have handled a related issue: whether including mandatory-arbitration provisions (a type of forum-selection clause) in an attorney-client agreement is a form of limiting malpractice liability.²⁶⁸

While Louisiana had no precedent on arbitration clauses in retainer agreements, the court cited with approval the positions taken by other jurisdictions²⁶⁹ and held that:

265. *Id.* at 441.

266. *Id.* at 440.

267. *Id.* at 442.

268. *Id.* at 442-43.

269. *Id.* (discussing the following opinions: Me. Prof'l Ethics Comm'n, Op. 170 (1999); Conn. Bar Ass'n, Ethics Op. 99-20, 1999 WL 958027, at *1 n.2 (1999); Oh. Bd. of Comm'n on Grievances and Discipline, Op. 96-9, 1996 WL 734408, at *4 (1999) (concluding that, while arbitration provisions are not limitations on malpractice liability, they should not be included in engagement letters because their inclusion violates an attorney's general duties to protect his or her "clients from agreements that do not serve

A mandatory-arbitration clause (or any forum-selection clause) might in a particular case give the lawyer an advantage over the client. But a clause that has only the possibility of reducing by some small percent the chances of an attorney's being found liable is categorically different from a clause that truly limits liability—for example, a clause that either directly limits liability (e.g., a hold-harmless clause) or a clause that so handicaps a client in a malpractice suit as to be a practical limitation on liability (e.g., a clause requiring suit to be filed within days of the malpractice's occurring). Other jurisdictions have recognized that requiring a client to arbitrate is not per se a limitation on liability because requiring arbitration does nothing more than set the litigation arena.²⁷⁰

The court disagreed with the *Ginters* that an arbitration clause was distinguishable from a COF clause because arbitration would be beneficial to both sides since it “streamlined procedures.”²⁷¹ A client who accepts an arbitration clause agrees to even more substantial differences than are the result of a COF clause:

The differences between state and federal court, however, are not nearly as substantial. Thus, there is a much stronger case for upholding a forum-selection clause like the one at issue in this case than an arbitration clause, where the risk of an attorney's taking advantage of a client is greater.²⁷²

The Court concluded that

[A] general rule that including a forum-selection clause into an attorney-client agreement is usually not a limitation on malpractice liability. Instead, it is only a limitation when the selected forum has rules expressly limiting liability or if litigating in that forum would be so unfair as to be a practical limitation on liability.²⁷³

the client's best interest”); Okla. Bar Ass'n Legal Ethics Comm'n, Op. 312, 2000 WL 33389634, at *2–5 (2000) (determining that an arbitration clause is not a limitation on liability because it merely determines the forum in which a case will be litigated, but concluding that an attorney should advise the client about the differences between litigating in a court and arbitration); New York Cty. Laws.' Assoc. Comm'n on Prof'l Ethics, Op. 723, 1997 WL 419331, at *2 (1997) (same)).

270. *Id.* at 443.

271. *Id.* at 444.

272. *Ginter*, 536 F.3d at 444. This is the reason why the ethics committees of Oklahoma and New York require the lawyer's detailed explanation to the client of the consequences of an arbitration clause. See Okla. Bar Ass'n Legal Ethics Comm'n, Op. 312, 2000 WL 33389634 at *2–5; New York Cty. Laws.' Assoc. Comm'n on Prof'l Ethics, Op. 723, 1997 WL 419331 at *2.

273. *Ginter*, 536 F.3d at 444.

Other courts have upheld COF and COL clauses. In *In re Agresti*,²⁷⁴ the Texas Court of Appeals found a Colorado COL and COF contained in an engagement agreement to be valid, but the clause was considered as permissive (and not exclusive) and therefore could not bar the action in Texas.²⁷⁵

In some cases, the courts have not engaged in special scrutiny of COL/COF clauses. In *Eaton & Van Winkle LLP v. Midway Oil Holdings Ltd.*,²⁷⁶ the plaintiff Eaton & Van Winkle LLP ("Eaton"), a New York law firm, brought an action in New York to recover legal fees against its client, Midway Oil Holdings Ltd. ("MOH"), licensed and registered in the Turks and Caicos. The plaintiff alleged that on June 5, 2007, Eaton executed a retainer agreement with MOH, which was signed by Mr. Baumgart, MOH's majority owner and president and also a defendant in the suit. In the retainer agreement, the plaintiff agreed to advise and represent MOH in a legal matter in the U.S. District Court for the Southern District of New York ("Libra Matter"). The firm alleged that for more than one year (from June 2007 to July 2008), it had performed the agreed services but MOH failed to pay the relevant legal fees, notwithstanding that both MOH and Mr. Baumgart personally promised to do so.²⁷⁷ After the retainer agreement was signed, another firm represented MOH in maritime arbitration in the UK; Eaton, however, continued to receive courtesy copies relevant to that proceeding from the London firm and it billed for reviewing these documents. MOH complained that Eaton was charging MOH for reading emails related to the London matter.²⁷⁸

MOH contested the court had personal jurisdiction over it. The plaintiff contended that the defendants—by establishing a continuing attorney-client relationship with Eaton, by exchanging meetings, telephone calls, and e-mails, and by defending the Libra Matter—

274. *In re Agresti*, No. 13-14-00126-CV, 2014 Tex. App. Lexis 5689 (Tex. App. 2014).

275. *Id.* at *2. In that case the clause read as follows:

This Agreement, and the application or interpretation thereof, shall be governed exclusively by its terms and by the laws of the State of Colorado. You agree that in any action relating to or arising from this Agreement, the State of Colorado is the proper jurisdictions and that Denver is the proper venue to hear any such action.

Id. at *4.

276. *Eaton & Van Winkle LLP v. Midway Oil Holdings Ltd.*, No. 30549, slip op. (N.Y. Sup. Ct. Mar. 15, 2010).

277. *Id.* at *3-4.

278. *Id.* at *10, *12-13.

"projected themselves into New York" and therefore were subject to the long-arm jurisdiction.²⁷⁹

The court held that it could entertain the lawsuit against the defendants because there is personal jurisdiction over a non-domiciliary who "transacts any business" within the State, provided that the cause of action arises out of the transaction of business.²⁸⁰ Among the factors²⁸¹ that the court relied on to establish personal jurisdiction was the COL clause in the retainer agreement, which stated:

This engagement and retainer agreement is governed by the laws of the State of New York without reference to its rules regarding conflicts of laws. The jurisdiction and forum for any claim arising under this agreement that is not subject to arbitration under the rules set forth above shall be exclusively the Federal or State courts located in the County and State of New York in the United States of America.²⁸²

The court found personal jurisdiction over the defendants because the defendants should have reasonably expected to defend a lawsuit brought by the plaintiff in New York. The court relied on several factors to support this conclusion: solicitation of the plaintiff's services in New York, frequent communications with the plaintiff law firm, and the choice of law clause in the Retainer agreement.²⁸³

The court in *Eaton* did not discuss any special considerations or public policies based on the COL/COF being inserted in retainer agreement. For example, it does not mention any informed consent requirement. However, in *Eaton* the clause was only one of the factors that the court considered important to find that the non-domiciliary had transacted business with the state.²⁸⁴

In *Beatie & Osborn LLP v. Patriot Sci. Corp.*,²⁸⁵ the plaintiff Beatie and Osborn, LLP ("B & O"), a New York law firm, brought suit in New York to collect unpaid fees from its former client Patriot Scientific Corporation ("Patriot"), a Delaware corporation with its principal place

279. *Id.* at *4.

280. *Id.* at *18-19.

281. *Id.* at *21. The other two factors were the defendants having "an ongoing contractual relationship" with the plaintiff, a New York legal firm (*id.* at *21, *25), and the defendants having negotiated or executed the contract in New York (even if, in this case, it happened through frequent, but not in person, communications). *Id.* at *26.

282. *Id.* at *27-28.

283. *Id.* at *28.

284. *Id.* at *21.

285. *Beatie & Osborn LLP v. Patriot Sci. Corp.*, 431 F. Supp. 2d 367 (S.D.N.Y. 2006).

of business in San Diego, California.²⁸⁶ In 2002, in an effort to protect patented intellectual property through licensing and litigation, Patriot approached the New York firm. Several telephone calls ensued. The firm asked to associate in the case John E. Lynch, a patent specialist and personal friend of B & O's partner Beatie.²⁸⁷ On November 1, 2002, the parties signed a retainer agreement ("Retainer Agreement"), which provided in relevant part:

This agreement and related matters not covered by the specifics of this agreement shall be governed by the laws of the State of New York, disputes shall be resolved in the federal or state courts of the City and State of New York, and the parties to this agreement consent to jurisdiction and venue in the City and State of New York.²⁸⁸

On February 27, 2004, Patriot and B & O entered into another agreement ("Fee Agreement") to specify the manner by which Patriot would be paying for fees and expenses of patent litigation. B & O represented Patriot in California, as the plaintiff or the defendant, in a total of seven lawsuits (including an action against a co-inventor of Patriot's technology—the "Inventorship Action").²⁸⁹

The relationship between B & O and Patriot ultimately deteriorated. In June 2005, Patriot, without the representation of B & O, settled the Inventorship Action and B & O claimed it was entitled to a portion of the settlement.²⁹⁰

B & O filed suit against Patriot in New York. After the defendants successfully removed the action to the Southern District of New York, they moved to dismiss it or to transfer the case to California.²⁹¹ Patriot argued that the court did not have subject matter jurisdiction because the law firm would be bound to file by the California Mandatory Fee Arbitration Act ("MFAA"), while B & O argued that its claims under the Retainer Agreement were governed by New York law, not California law and the MFAA.²⁹²

The court agreed with B & O and held that New York had jurisdiction and New York law applied.²⁹³ Because "a federal court sitting in diversity applies the conflict-of-law rules of the forum state,"²⁹⁴

286. *Id.* at 375. B & O also sued on tortious interference grounds against two individual defendants. *See id.*

287. *Id.* at 376.

288. *Id.*

289. *Id.*

290. *Id.* at 377.

291. *Id.* at 375.

292. *Id.* at 377–78.

293. *Id.* at 382, 392.

294. *Id.* at 378.

the court applied New York law conflicts rules. Relying on established case law,²⁹⁵ the court clarified that when parties have agreed on a COL clause, a court "may refuse to enforce [it] . . . only where (1) the parties' choice has no reasonable basis or (2) application of the chosen law would violate a fundamental public policy of another jurisdiction with materially greater interests in the dispute."²⁹⁶

Here, the parties' choice of New York law clearly has a reasonable basis: B & O is a New York limited liability partnership, is engaged in the practice of law in New York, and maintains its principal place of business in New York.²⁹⁷

As for the question "of whether the application of New York law would violate a fundamental public policy of another jurisdiction with materially greater interests in the dispute,"²⁹⁸ the court applied a two-step analysis:²⁹⁹

The Court first must determine whether California law would govern this dispute in the absence of the parties' contractual choice-of-law provision; and, if so, the Court must decide whether the application of New York law would violate a fundamental public policy of California.³⁰⁰

In deciding which law would govern in the absence of a clause, the court applied the "center of gravity" or "grouping of contacts" approach, which is the New York conflict of law rule for contracts.³⁰¹ This rule requires a court to look at a "spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties."³⁰² Here the court found that California law would apply.³⁰³ while both New York and California had contacts, California contacts were greater because if it is true that the "Retainer Agreement was negotiated in both New York and California, [] the bulk

295. *Beatie & Osborn LLP*, 431 F. Supp. 2d at 378. The court cites *Radioactive, J.V. v. Manson*, 153 F. Supp. 2d 462, 469–70 (S.D.N.Y. 2001), citing several precedents.

296. *Id.* This is also the Restatement (Second) of Conflicts of Laws test, as the court pointed out. *See id.* at 378 n.4 (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187(2) (AM. LAW INST. 1971)).

297. *Id.*

298. *Id.*

299. *Id.* (referring to *SG Cowen Sec. Corp. v. Messih*, 2000 U.S. Dist. LEXIS 6697, at *2–4 (S.D.N.Y. 2000)).

300. *Id.* at 378.

301. *Id.* at 379 (citing *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1539 (2d Cir. 1997)).

302. *Id.* at 379.

303. *Id.*

of B & O's representation of Patriot took place in California courts."³⁰⁴ The analysis, however, did not stop there:

Having found that California law would govern this dispute in the absence of the Retainer Agreement's choice-of-law provision, the Court must address whether applying New York law in accordance with that provision would violate a fundamental public policy of California. The Court answers this question in the negative.³⁰⁵

The court disagreed with the defendants that "'the prompt and expeditious resolution of attorney fee disputes' in the absence of an arbitration agreement constitutes a fundamental public policy of California."³⁰⁶ The defendants relied on a California Supreme Court case for that proposition,³⁰⁷ but the court found that that case concerned the California Arbitration Act ("CAA")³⁰⁸ and its holding was not applicable to the MFAA (which is the statute involved in the case). For these reasons, the COL/COF clause in the Retainer Agreement was not to be disturbed on public policy grounds.

Not only did the COL clause of the Retainer Agreement govern the Retainer Agreement; the court also found that the clause governed the claims for breach of the Fee Agreement, which had no choice of law provision because

The Retainer Agreement's choice of law provision states that New York law will govern 'related matters not covered by the specifics of the Retainer Agreement The Fee Agreement governs the manner by which Patriot is to pay to B & O fees and expenses incurred during the patent litigation that was contemplated under the Retainer Agreement.'³⁰⁹

Accordingly, the Court finds that the Retainer Agreement's choice-of-law provision applies to the Fee Agreement, and consequently that New York law applies to B & O's breach of contract claim with respect to the Fee Agreement.³¹⁰

304. *Id.*

305. *Beatie & Osborn LLP*, 431 F. Supp. 2d at 379.

306. *Id.* at 381 (internal citations omitted).

307. *Id.* (discussing *Aguilar v. Lerner*, 88 P.3d 24 (Cal. 2004)).

308. *See id.* at 380. *Aguilar* was also a fee dispute between attorney and client, but unlike in *Beatie*, the retainer agreement contained an arbitration clause. The *Beatie* court found that the California Arbitration Act was applicable and the clause was enforceable. The California Supreme Court held that "California has a 'strong public policy' in favor of arbitration." *Id.* (internal citations omitted).

309. *Id.* at 382 (internal citations omitted).

310. *Id.*

The court denied the motion to dismiss.³¹¹

Because New York law applies in this action, the Court finds that plaintiffs had no obligation to notify Patriot of its right to MFAA arbitration before initiating an action for fees. Therefore, Patriot's motion to dismiss for lack of subject matter jurisdiction is denied with respect to B & O's claims for breach of contract, quantum meruit, and unjust enrichment.³¹²

*Beatie & Osborn LLP v. Patriot Sci. Corp.*³¹³ is significant because the court did not apply factors peculiar to retainer agreements between lawyer and client. The COL clause in the retainer agreement was discussed as if it were contained in an ordinary contract. The court did not discuss or even mention the concept of informed consent by a client or attempt to limit liability, as we have seen the courts do in *Falk*,³¹⁴ *Brown*,³¹⁵ and *Ginter*.³¹⁶ Instead, in *Beatie*³¹⁷ the jurisdiction of the New York court was found on the mere basis of the COL clause.

B. *What Approach Should the Courts Follow?*

The cases that we have discussed can be seen as a continuum, from cases that refuse to enforce the COL/COF clauses based on special considerations of attorney-client relationship to cases that enforce the clause after considerations of attorney-client relationship to cases that do not express any concern for the special attorney-client relationship (enforcing such clauses using the same methodology that would apply to an agreement between commercial parties). Given this diversity in the case law, what approach should the courts adopt?

As an initial point, we would draw two distinctions: between COL and COF clauses and between civil litigation and disciplinary matters.

311. *Id.* B & O moved to remand the action to state court, which is not interesting for the purpose of this paper. However, for the sake of providing context, the motion to remand was denied because the court found that the law firm had unequivocally joined in the notice of removal to the federal court. *See id.* at 384.

312. *Id.* at 382.

313. *Beatie & Osborn LLP v. Patriot Sci. Corp.*, 431 F. Supp. 2d 367 (S.D.N.Y. 2006).

314. *See Falk & Fish, L.L.P. v. Pinkston's Lawnmower & Equip., Inc.*, 317 S.W.3d 523 (Tex. App. 2010).

315. *See Brown v. Partipilo*, No. 1:10CV110, 2010 U.S. Dist. LEXIS 108106 (N.D. W. Va. 2010).

316. *See Ginter v. Belcher, Prendergast & Laporte*, 536 F.3d 439 (5th Cir. 2008). In *Eaton & Van Winkle LLP v. Midway Oil Holdings Ltd.*, No. 30549, slip op. (N.Y. Sup. Ct. Mar. 15, 2010), the court did not discuss the requisite of informed consent by the client; however, in *Eaton*, the clause was only one of the factors that the court used for establishing the jurisdiction. *Id.* at *13.

317. *Beatie & Osborn LLP*, 431 F. Supp. 2d at 382.

1. The Standard for Enforceability of COL Clauses in Civil Litigation

With regard to COL clauses in civil litigation, as in many areas of the law, the fundamental values at stake are *efficiency* and *fairness*. As to efficiency, in our judgment the current state of the law dealing with principles governing choice of law and enforceability of selection clauses for attorney-client engagement agreements is very costly without corresponding gain. In the absence of a selection clause, the forum court must determine its own choice of law principles applicable to the dispute, it must determine the principles applied by other jurisdictions that have an interest in the matter, and it must evaluate public policies of the jurisdictions that are involved. If a selection clause is involved, the court must apply a similar analysis to the selection clause. Moreover, the extensive judicial inquiry required by this state of the law discourages lawyers from including selection clauses in their agreements—Why go to the trouble when use of the clause simply creates another issue that a disgruntled client can use to attack an engagement agreement?

We recommend that courts follow a different approach, one in which a COL clause in an engagement agreement is enforceable so long as the chosen law has a *reasonable relationship to the contract, the dispute, or the parties*. We define “reasonable relationship” broadly. A clause should be treated as having such a relationship if the chosen law is that of the residence or principal place of business of the client, the place where the lawyer or lawyers who are principally responsible for the matter usually practice, the place of performance of the contract, or the jurisdiction in which litigation contemplated by the engagement will take place. In some cases multiple jurisdictions will bear a reasonable relationship, in which case the COL clause should be enforceable for any of these jurisdictions. We do not intend this list of jurisdictions with a reasonable relationship to be exclusive; depending on the situation, other jurisdictions may have a reasonable relationship to the contract, the dispute, or the parties.

The reasonable-relationship test that we propose should be relatively easy to administer and should encourage lawyers to include COL clauses in their engagement agreements, thus reducing dramatically the costs of law determination in lawyer-client disputes with multijurisdictional aspects. But what about the fairness of this approach? We believe that clients are adequately protected from unfair agreements in two ways. First, the reasonable-relationship test itself incorporates fairness. Lawyers cannot arbitrarily choose a jurisdiction that has no relationship to the contract, the dispute, or the parties in an effort to “cherry pick” the most favorable law. Second, public policy doctrine

remains a check on fundamental unfairness in a choice-of-law provision. In reviewing a COL clause, a court will consider its own public policy and should refuse to enforce a clause if its application would violate a fundamental public policy of the forum. Courts must, however, be cautious in applying the public policy limitation because a broad approach will undermine the efficiency justification for enforcement of such clauses and indeed will call into question the strong public policy in favor of freedom of contract. In our judgment, a court should refuse to enforce a COL clause on public policy grounds only when the public policy is both clear and strong.

2. The Public Policy Limitation on Enforceability of COL Clauses

The test we propose for determining the enforceability of COL clauses in engagement agreements is a modified version of the test used by the court in *Beatie & Osborn LLP v. Patriot Sci. Corp.*³¹⁸ In that case, the court, applying New York law, upheld the plaintiff's New York choice-of-law clause in its retainer agreement, stating that a court "may refuse to enforce [it] . . . only where (1) the parties' choice has no reasonable basis or (2) application of the chosen law would violate a fundamental public policy of another jurisdiction with materially greater interests in the dispute."³¹⁹ We would modify part (2) of the test to read "would violate a fundamental public policy of the forum." In *Beatie*, the clause satisfied the reasonable-relationship test because B & O was a New York limited liability partnership, was engaged in the practice of law in New York, and maintained its principal place of business in New York.³²⁰

Although the court in *Beatie* examined the public policy of the other jurisdiction with a significant interest—California—the court's public policy analysis is an example of the restrained use of public policy that we suggest. In *Beatie*, the defendant had argued for dismissal of the case claiming that the case should have been brought in California under its Mandatory Fee Arbitration Act (MFAA). The court found that while California did have a strong public policy in favor of arbitration, the public policy underlying the MFAA was not sufficiently robust to

318. *Beatie & Osborn LLP v. Patriot Sci. Corp.*, 431 F. Supp. 2d 367 (S.D.N.Y. 2006).

319. *Id.* at 378. This is also the test set forth in the Restatement (Second) of Conflicts of Laws. See *RESTATEMENT (SECOND) OF CONFLICTS OF LAWS* § 187 (AM. LAW INST. 1971).

320. *Beatie & Osborn LLP*, 431 F. Supp. 2d at 378.

override the parties' choice of law provision. The MFAA is narrowly drawn and only applies if the client elects the procedure.³²¹

The reason why we suggest adopting a modified version of *Beatie*, substituting the jurisdiction with materially greater interests in the dispute with the forum state, is again efficiency. We do not believe it is efficient to go through the complication of conflict of laws analysis to identify the jurisdiction with a greater interest in the dispute, only to see whether that jurisdiction has a public policy that would bar the COL. While there are significant differences in law among American jurisdictions, the legal principles that reach the level of public policy are similar. We believe that reference to the forum state to check whether a public policy would bar the enforcement of a COL clause is a sufficient protection.

Here is an example of a situation in which the public policy of the forum jurisdiction might override a COL clause.³²² Suppose a Minnesota resident working in Alaska is injured in a work-related incident. The resident hires a Minnesota lawyer under a 25 percent contingent fee contract to represent him in a workers' compensation case in Alaska. The case results in an award and a fee determination by the Alaska Compensation Board in accordance with Alaska law that provides attorney fees using percentages that are less than the attorney would receive under the engagement agreement. The client objects to paying more than the amount awarded by the Alaska Board, and the attorney brings suit in Minnesota to enforce the fee agreement. The agreement has a reasonable relationship to Minnesota because the lawyer practices and lives in Minnesota and the client is from Minnesota. The agreement does not seem to violate any clear strong policy of Minnesota, so the COL clause should be enforced, and the lawyer should receive the full 25 percent even though it is in excess of the amount awarded by the Alaska Board (This circumstance is not unusual; lawyers may have fee agreements in which they receive from their clients more than court awarded fees, provided the agreement is clear on that point.). Suppose, however, the suit was brought in Alaska (perhaps the client beats the attorney in a race to the courthouse and sues first in Alaska). An Alaska court *might* find that the COL clause for Minnesota violates a clear, strong public policy of Alaska on the ground that the fee percentages in Alaska are an integral part of the state's worker's compensation system.³²³ On the other hand, the court *might not* find that Alaska has

321. *Id.* at 380-81.

322. The fact pattern is based on *Hoffman v. Henderson*, 355 N.W.2d 322 (Minn. Ct. App. 1984), but has been modified to include a choice-of-law clause to illustrate the point of when the forum's public policy might override a choice-of-law clause.

323. *See Hoffman*, 355 N.W.2d at 324.

such a clear, strong public policy. The fee awards in Alaska might not be caps; they might simply be fee awards with the attorney and client free to agree on a greater attorney fee. An Alaska court would have to decide the clarity and strength of the Alaskan public policy with regard to workers' compensation fee awards.

3. Should COL Clauses be Subject to an Informed Consent?

Should a COL clause be subject to a requirement of informed consent? As an initial matter, the ethics rules impose a requirement of informed consent in a number of situations (e.g., limited engagement agreements require informed consent,³²⁴ waiver of conflict of interest requires informed consent,³²⁵ and business transaction with clients require informed consent among other requirements³²⁶), but no ethics rule requires informed consent to a COL clause. In fact, the ethics rules do not deal with COL clauses. The only mention of choice of law is in the recent amendment to Comment [5] to Rule 8.5,³²⁷ adopted based on the work of the Ethics Commission 20/20,³²⁸ which allows the parties to a retainer agreement to specify the application of the rules of a certain jurisdiction with which the parties have a significant relationship to govern conflict of interest issues. The comment that was approved by the House of Delegates—and that follows verbatim the recommendation of the Commission—requires informed consent for that type of agreement to be valid.³²⁹ However, there is no indication that the

324. MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2016).

325. *Id.* at r. 1.7(b)(4).

326. *Id.* at r. 1.8(a).

327. *Id.* at r. 8.5 cmt. 5. The comment provides that:

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

Id.

328. See generally *ABA Comm'n on Ethics 20/20: ABA Midyear Meeting, February 2013*, AM. BAR ASS'N http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last updated 2017).

329. See *ABA Comm'n on Ethics 20/20, Report to the House of Delegates* (AM. BAR ASS'N, Proposed Resolution Draft 2013), <http://www.americanbar.org/content/dam/aba>

Commission expressly considered the necessity of requiring informed consent or difficulties in application of the concept before making the recommendation.³³⁰ In fact, there is no discussion of the requirement in the Commission's Report. Therefore, currently the rules of ethics do not expressly require informed consent for a COL clause. Moreover, Comment [5] to Rule 8.5 is an ethics rule, which need not apply in a choice-of-law dispute for civil liability purposes.

We think that a requirement of informed consent should not apply to COL clauses for reasons both of practicality and fairness. The concept of informed consent, which is taken from the Rules of Professional Conduct, requires a lawyer to explain to the client the advantages, disadvantages, and alternatives to a proposed course of conduct.³³¹ Imagine a COL clause in which the engagement agreement identifies the law of the jurisdiction in which the lawyer principally practices, and that this jurisdiction is different from that of the client's residence. What would the lawyer be required to do to obtain the client's informed consent? The lawyer would have to identify the possible jurisdictions for choice of law, which might include jurisdictions other than those where the lawyer practices and the client resides. The lawyer would then have to explain to the client the advantages and disadvantages for the client of each jurisdiction's law. This would be so time-consuming that no lawyer would do it; moreover, the task would be impossible because the lawyer could not know in advance what issue or issues might be involved in a dispute with the client: statute of limitations? Fee caps? Lawyer liens? Fee splitting? This is similar to Heisenberg's uncertainty principle in quantum mechanics.³³² Because we do not know what issues will arise, it is impossible, when the retainer agreement is entered into, to discuss with the client the advantages and disadvantages of a COL clause, except in a very general sense, which would be meaningless to the client.³³³

/administrative/ethics_2020/20121112_ethics_20_20_choice_of_rule_resolution_and_report_final.authcheckdam.pdf.

330. See *id.*

331. See MODEL RULES OF PROF'L CONDUCT r. 1.0(e). See also *id.* at cmt. 6-7.

332. *Uncertainty Principle*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/science/uncertainty-principle> (last visited Mar. 26, 2017). The principle states that "the position and the velocity of an object cannot both be measured exactly, at the same time, even in theory." *Id.* See also *The Uncertainty Principle*, GA. STATE UNIV., <http://hyperphysics.phy-astr.gsu.edu/hbase/uncer.html> (last visited Mar. 26, 2017).

333. If it were possible to identify *both* the jurisdictions whose law might be chosen *and* the issues that would arise in a future dispute, it would be possible to draft a disclosure clause. For example, let's say that New York and South Carolina are the jurisdictions whose law might be chosen. The lawyer could, for example, say: "This agreement is governed by New York law excluding its choice of law rules. New York law may have advantages and disadvantages to you depending on the particular issue involved. For example, under New York law, any retainer that you pay can be deposited

Moreover, as a matter of fairness, clients do not need the protection of informed consent to COL clauses. Often when the ethics rules impose a requirement of informed consent it is because the lawyer is seeking protection from responsibility.³³⁴ This is not the case with COL clauses. Usually the choice of law will not give a particular advantage to a lawyer (and if it does, the advantage will usually be unknown at the time of the engagement and could just as easily have turned out to be favorable to the client). What the COL clause actually does is to clarify the relationship by identifying the applicable law, not relieve the lawyer of responsibility. In addition, for the reasons set forth above, clients already have the protection of fairness through the reasonable relationship and public policy limitations on the enforceability of COL clauses.

4. Enforceability of COF Clauses in Civil Litigation

Suppose the engagement agreement has a *COF* clause, which may or may not be coupled with a COL clause. What should be the standard for enforceability of such clauses? As discussed in Part II(A), a number of courts have referred to the need for informed consent to COF clauses. In addition, ethics opinions have advised that arbitration clauses, which are a type of COF, are subject to the requirement of informed consent.³³⁵ A COF clause potentially has a greater impact on a client than a COL clause because it can require the client to incur the expense to retain counsel or go personally or both to another jurisdiction to enforce or defend a claim against a lawyer. Therefore, in our view, lawyers using COF clauses should be required to warn the client if the COL clause is

in my operating account and I am not required to deposit it into my trust account. Had South Carolina law be applicable, I would be required to deposit any unearned fee in my trust account, which would be more protective for you. Whether New York or South Carolina law is more advantageous to you depends on the particular issue which we cannot know at this time.”

The problem is that it is impossible to know at the time of the engagement what issues might arise in the future, and it is therefore impossible to inform the client of the relative advantages and disadvantages of a choice of law. In fact, informed consent is more complex because a lawyer would also have to advise the client of the consequences of having no choice-of-law clause.

334. MODEL RULES OF PROF'L CONDUCT *rr.* 1.8(a), 1.7(b)(4). The prime example is the business transaction with the client, which requires informed consent, besides fairness and the advice to seek independent representation. *See id.* *r.* 1.8(a). Another example is in conflict of interest situations: Model Rule 1.7(b)(4), in most cases, allows a lawyer who faces a conflict of interest to accept or continue the representation, if he or she obtains the informed consent of the client. Several other examples could be made and would show that the function of requiring informed consent is typically when the lawyer is in some way limiting his or her responsibility to the client. *Id.* at *r.* 1.7(b)(4).

335. *See* Nathan M. Crystal, *Ethics Watch: Enforceability of Arbitration Clauses in Engagement Agreements*, 28 S. C. LAWYER 11, 11 (Sept. 2016).

for a jurisdiction *other than the jurisdiction of the client's residence (or principal place of business in case of a business)*. We believe that a client's consent will be informed if the engagement includes a notice like the following:

THIS ENGAGEMENT PROVIDES THAT ANY CLAIM BY OR AGAINST [NAME OF LAWYER] MUST BE BROUGHT [SPECIFY THE CHOICE OF FORUM]. CLIENT UNDERSTANDS THAT HE CANNOT BRING A CLAIM AGAINST LAWYER IN ANY OTHER PLACE. CLIENT MAY INCUR EXPENSE AND LOSS OF TIME TO BRING OR DEFEND AGAINST A CLAIM IN THAT FORUM. BY SIGNING THIS AGREEMENT CLIENT GIVES HIS INFORMED CONSENT TO THIS CHOICE OF FORUM.

5. Are COL/COF Clauses Enforceable as to Legal Malpractice and Other Tort Claims?

Should the enforceability of COL/COF clauses be limited to contractual disputes or should they cover tort matters, such as legal malpractice, breach of fiduciary duty, fraud, and the like? One issue that may arise with regard to such claims is whether the COL/COF clause applies to such claims. Careful drafting is important. The clause *should not be limited* to claims "for breach of this engagement or contract." Instead, the clause should apply to any claim for breach of this agreement, any claim arising out of or related to this agreement, or any claim arising out of or related to the relationship between the parties to this agreement or their agents and employees.

Aside from drafting, as a matter of policy should COL/COF clauses be limited to claims for breach of the agreement? Our emphatic answer is "No." These clauses, if properly drafted, should cover all claims, whether in contract or tort, arising from the engagement or the attorney-client relationship. We have several reasons. First, if these clauses are limited to contract claims, it will lead to "splitting of causes of action" with contract claims subject to one set of laws and fora, while others become subject to different law and different fora. Such a situation leading to multiple lawsuits is highly inefficient and unfair to both parties. Second, causes of action for legal malpractice and breach of contract can be subject to COF clauses for arbitration.³³⁶ There is no reason why both tort and contract claims should not be subject to both COL and COF clauses. Further, limited case law supports the proposition that COL clauses covering legal malpractice claims are

336. See *id.* at 13.

enforceable. In *Rogers v. Lee*³³⁷ (discussed in Part II), the South Carolina Court of Appeals held that the choice-of-law clause in the attorney's engagement agreement, which selected North Carolina law, applied in a legal malpractice action brought by the client in South Carolina. As a result, North Carolina's four-year statute of repose applied to the plaintiff's claim, resulting in summary judgment for the defendant lawyer.³³⁸

6. Enforceability of COL Clauses in Disciplinary Proceedings

The choice of law in breach of contract or legal malpractice actions is different from the choice of law in disciplinary proceedings, which is governed by Model Rule 8.5 (and its state equivalents). That rule provides that in case of litigation matters, the ethics rules of the jurisdiction in which the tribunal sits control,³³⁹ while in nonlitigation matters, the rules of "the jurisdiction in which the lawyer's conduct" occurred control, unless "the predominant effect of the conduct is in a different jurisdiction" in which case the rules of that jurisdiction apply.³⁴⁰

A lawyer's engagement agreement with a client cannot dictate either choice of disciplinary forum or choice of law before a disciplinary body. However, if an engagement agreement contains a valid COL and the lawyer conforms his conduct to the law of the chosen jurisdiction that may be relevant in determining whether the lawyer is subject to discipline. ABA Model Rule 8.5(b)(2) provides:

A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.³⁴¹

In addition, Comment [5] to Rule 8.5 specifies that a COL with regard to interest may be given effect to determine where the predominant effect of the lawyer's conduct occurred:

With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.³⁴²

337. *Rogers v. Lee*, 777 S.E.2d 402, 406 (S.C. Ct. App. 2015).

338. *Id.* at 407–08.

339. MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(1).

340. *Id.* at r. 8.5(b)(2).

341. *Id.*

342. *Id.* at r. 8.5 cmt [5].

C. *Drafting Considerations*

Considering the variation of the case law on the issue of the enforceability of choice of forum/choice of law clauses, it is impossible to give general guidelines on the enforceability of a COL/COF clause in a retainer agreement. However, we can offer some thoughts that could guide lawyers' conduct on this aspect. First, do not make clerical mistakes as in *Falk*;³⁴³ they cannot help and may create either ambiguities or a conclusion that the agreement lacks informed consent. The case law warns against the risk of "sloppy drafting" of forum selection clauses in retainer agreements.³⁴⁴ Second, do not try to use the choice of law/choice of forum as a substitute for a limitation of liability clause, as was the situation in *Ginter*;³⁴⁵ the court might find the clause unenforceable on that basis. Third, discuss with your client (especially if the client is not sophisticated) the clause and explain the consequences of that clause or you might be denied the benefit of the COL clause, as was the result in *Brown v. Partipilo*.³⁴⁶ While we argue in this article that courts should not require informed consent to enforce COL clauses, many courts may make this analysis, so prudent lawyers will seek informed consent. Fourth, do not overreach: the choice of law and forum must bear a reasonable relationship with the parties and the circumstances as in *Beatie*.³⁴⁷ Include in the clause language showing a reasonable relationship between the chosen law and the agreement, the parties, or the dispute. If you are a South Carolina firm, with principal place of business in Hilton Head, and you assist a South Carolina client, your choice of Wyoming law and Cheyenne courts is likely to be seen as unreasonable (even without disturbing *forum non conveniens* or closed door statutes). Fifth, if the relationship with your client is grounded on several documents (as it was the case in *Beatie*³⁴⁸ where there was a Retainer Agreement and a Fee Agreement), make sure to insert the same clause in both. The *Beatie* court found that the COL clause also governed the document in which it was not contained, but again your court might not be so generous. Sixth, include an appropriate warning to obtain informed client consent to a COF clause (see above).

343. See *Falk & Fish, L.L.P. v. Pinkston's Lawnmower & Equip., Inc.*, 317 S.W.3d 523 (Tex. App. 2010).

344. *Id.* at 528–29.

345. See generally *Ginter v. Belcher, Prendergast & Laporte*, 536 F.3d 439 (5th Cir. 2008).

346. See generally *Brown v. Partipilo*, No. 1:10CV110, 2010 U.S. Dist. LEXIS 108106 (N.D. W. Va. 2010).

347. See generally *Beatie & Osborn LLP v. Patriot Sci. Corp.*, 431 F. Supp. 2d 367, 378 (S.D.N.Y. 2006).

348. *Id.* at 376.

Even if COL and COF clauses in engagement agreements are possible, “[p]articular care is in order because agreements between a lawyer and client are interpreted from the reasonable client’s perspective, meaning that the client will typically get the benefit of the doubt when contract language is ambiguous or unclear.”³⁴⁹

IV. CONCLUSION

In this Article we have discussed the complicated analysis that courts must use when a lawyer’s engagement agreement does not contain a COL/COF clause. Our discussion has concentrated on malpractice, attorneys’ liens, and fee cap issues, but similar complications exist in other aspects of the attorney-client relationship. In the absence of a COL/COF clause, a court must determine its own choice-of-law principles applicable to the dispute, and it must evaluate public policies of other jurisdictions that have an interest in the matter.

We have also examined the judicial approaches when lawyers’ engagement agreements contain COL/COF clauses. If a COL/COF clause is involved, the court must apply a similar analysis to the selection clause.

The extensive judicial inquiry required by this state of the law discourages lawyers from including selection clauses in their agreements. This situation creates uncertainty because parties cannot anticipate which law courts will apply to any of the varied disputes that might arise. In short, the present situation is unfair and inefficient to both client and lawyer.

We believe that COL /COF clauses—absent overreaching—serve fairness and efficiency goals although they should be treated somewhat differently. In our view, courts should generally enforce COL clauses if (1) the law chosen has a reasonable relationship to the engagement agreement, the parties, or the dispute, and (2) application of the chosen law does not violate a clear, strong public policy of the forum. COL clauses should *not* be subject to a requirement of informed consent. By contrast, COF clauses should be enforced if the same requirements of reasonable relationship and no violation of public policy exist but should also be subject to informed consent for the reasons detailed in this paper. If courts follow our proposals, we believe that the enforceability of COL and COF clauses will be much clearer, that lawyers will have an incentive to include such clauses in their engagements, and that fair treatment of clients will not suffer.

349. Green, *supra* note 229, at 6.
